89

Mr Justice Swayne

March 11th 186

SUPREME COURT OF THE UNITED STATES.

No. ~~255.~~ 170.

JOHN A. WASHINGTON AND WILLIAM F. TURNER,
PLAINTIFFS IN ERROR,

v.

MAHLON D. OGDEN, TRUSTEE OF THE CHICAGO LAND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

G. S. GIDEON, Printer, No. 511 Ninth Street, Washington, D. C.

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United States of America, Northern District of Illinois, *ss.*

Pleas in the Circuit Court of the United States of America for the Northern District of Illinois, held at the city of Chicago, in said district, before the Hon. Thomas Drummond, judge of the District Court, and, in the absence pro tempore of the Hon. John McClean, one of the justices of the Supreme Court of the United States, sole judge of said Circuit Court, at the May term, A.D. 1860, of said court, to wit, on Saturday, the fifth day of May, in the year of our Lord one thousand eight hundred and sixty, and of our independence the eighty-fourth year.

WM. H. BRADLEY,
Clerk.

Northern District of Illinois, *ss.*

MAHLON D. OGDEN, Trustee of the Chicago Land Company,
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER.

Mahlon B. Ogden, trustee of the Chicago Land Company, who is a citizen of the State of Illinois, puts in his place Messrs. Scammon, McCagg, and Fuller, his attorneys, against John A. Washington and William F. Turner, who are citizens of the State of Virginia, in a plea of debt.

Northern District of Illinois, *ss.*

Be it remembered, that on this day, to wit, the thirteenth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, came the said plaintiff, by his said attorneys, and filed, in the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed his transcript from the records of the Superior Court of Cook County, State of Illinois; and also, at the same time, filed his bond for costs; which said bond for costs, and also said transcript, is in the words and figures following, to wit:

United States of America, Northern District of Illinois, *ss.*

Circuit Court. December Term, 1859.

M. D. OGDEN
v.
JOHN A. WASHINGTON et al. } In

We enter ourselves security for costs in this cause, and promise to

pay all costs which may accrue to the opposite party in this action, as to any of the officers of this court; and in default of payment by the defendants of any costs ordered or *ordered or* adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against.

Dated this 19th day of December, A.D. 1859.

GASKINS, THOMAS & ROBERTS.

Indorsed: Filed December 19th, 1859. Wm. H. Bradley, clerk.

Transcript.

United States of America, State of Illinois, Cook County.

Pleas before the honorable the judges of the Superior Court of Chicago within and for the County of Cook and State of Illinois, at a regular term of said Superior Court of Chicago, begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the third day, of October, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States of America the eighty-fourth.

Present, the Hon. John M. Wilson, chief justice of Superior Court of Chicago, Van H. Higgins and Grant Goodrich, judges, Carlos Haven, prosecuting attorney, John Gray, sheriff of Cook County.

Attest, WALTER KIMBALL,
Clerk.

Be it remembered, that heretofore, to wit, on the fifth day of September, in the year of our Lord one thousand eight hundred and fifty-nine, there was filed in the office of the clerk of the Superior Court of Chicago a certain precipe for summons, affidavit for writ of attachment, and attachment bond; which said precipe, affidavit, and bond are in the words and figures following, to wit:

State of Illinois, Cook County.

Superior Court of Chicago. October Term, A.D. 1859.

MAHLON D. OGDEN, Trustee of the Chicago Land Company,
v.
WILLIAM F. TURNER and JOHN A. WASHINGTON.

Debt, $35,000. Damages, $10,000.

The clerk will please issue summons for defendants in the above-entitled cause, returnable to the October term, as above.

SCAMMON, McCAGG & FULLER,
Plaintiff's Attorneys.

State of Illinois, Cook County, *ss.*

Superior Court of Chicago. October Term, A.D. 1859.

Mahlon D. Ogden, of Chicago, in said county and State, being duly sworn, on oath says, that John A. Washington and William F. Turner are justly indebted to him, as trustee of the Chicago Land Company, in the sum of thirty-five thousand dollars, for money due upon a contract made with him by said Washington and Turner, dated June 20th, 1859, for the purchase of the property described in John S. Wright's contract with the trustees of the Chicago Land Company, dated on or about the 4th day of June, 1855, being the first instalment due upon said contract with said Washington and Turner. I further say, that said Turner and Washington are non-residents of the State of Illinois, but are residents of the State of Virginia. I therefore pray that a writ of attachment may issue against their property, in due form of law, for the recovery of said indebtedness.

MAHLON D. OGDEN.

Subscribed and sworn to before me, September 3d, 1859.

JOHN FORSYTHE, [SEAL.]
Notary Public.

"Attachment Bond."

"Know all men by these presents, that we, Mahlon D. Ogden as principal, and Walter S. Gurnee as security, are held and firmly bound unto John H. Washington and William F. Turner in the penal sum of seventy ($70,000) dollars, lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fifth day of September, A.D. 1859.

The condition of the above obligation is such, that whereas the above bounden Mahlon D. Ogden has on the day of the date hereof, prayed an attachment out of the Superior Court of Chicago, Cook County, at the suit of himself against the estate of the above named John A. Washington and William F. Turner, for the sum of thirty-five thousand dollars; and the same being about to be sued out of said court, returnable on the first Monday of October next, to the term of the said court then to be holden.

Now if the said Mahlon D. Ogden shall prosecute his said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said John A. Washington and William F. Turner all such costs in said suit, and such damages as shall be awarded against the said Mahlon D. Ogden, his heirs, executors, or administrators, in

any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void, otherwise to remain in full force and effect.

W. S. GURNEE, [SEAL.]
MAHLON D. OGDEN. [SEAL.]

Signed, sealed, and delivered in the presence of

And thereupon, accordingly, on the said fifth day of September, in the year of our Lord one thousand eight hundred and fifty-nine, there was issued out of and under the seal of said court, a certain people's writ, commonly called a writ of attachment, which said writ, with the sheriff's return thereon indorsed, is in the words and figures following, to wit:

State of Illinois, Cook County, *ss.*

The people of the State of Illinois to the sheriff of said county, greeting:

Whereas, Mahlon D. Ogden hath complained on oath, to Walters Kimball, clerk of the Superior Court of Chicago, of Cook County, that John A. Washington and William F. Turner are justly indebted to the said Mahlon D. Ogden, as trustee of the Chicago Land Company, to the amount of thirty-five thousand dollars, and oath having been also made that the said John A. Washington and William F. Turner reside out of this State, so that the ordinary process of law cannot be served upon them.

And the said Mahlon D. Ogden having given bond and security, according to the directions of the act in such case made and provided.

We therefore command you, that you attach so much of the estate, real or personal, of the said John A. Washington and William F. Turner, to be found in your county, as shall be of value sufficient to satisfy said debt and costs, according to the said complaint, and such estate so attached in your hands to reserve and so to provide, that the same may be liable to further proceedings thereupon, according to law, at a term of said Superior Court at Chicago, to be holden at Chicago, within and for the county of Cook, on the first Monday of October next, so as to compel the said John A. Washington and William F. Turner to appear and answer the complaint of the said Mahlon D. Ogden; and that you also summon the Chicago Marine and Fire Insurance Company, the Marine Bank of Chicago, as garnishees, to be and appear at the said court on the said first Monday of October next, then and there to answer to what may be objected against them, when and where you shall make known to the said court how you have executed this writ.

And have you then and there this writ.

Witness, Walter Kimball, clerk of our said court, and the seal

thereof, at Chicago, in said county, this 5th day of September, in the year of our Lord one thousand eight hundred and fifty-nine.

[SEAL.] WALTER KIMBALL,
Clerk.

Indorsed: Served this writ on the within named Chicago Marine and Fire Insurance Company and the Marine Bank of Chicago, by reading the same, and delivering a copy thereof to Hugh T. Bickey, acting president of said companies, as garnishees, this 5th day of September, A. D. 1859.

JOHN GRAY,
Sheriff.
By GEORGE ANDERSON,
Deputy.

Fees, 2 services, ...	$1 00
2 copies, ...	1 00
2 miles, ...	10
1 return, ...	10
	$2 20

Paid by plaintiff's attorneys.

By virtue of the within writ of attachment, I did, on the 5th day of September, A. D. 1859, levy upon and attach all the right, title, and interest of the within named defendants in and to the following described real estate, to wit, the one equal undivided one half of section twenty-one, in township thirty-nine north, range thirteen east, of the third principal meridian, being three hundred and twenty acres, more or less; and also on a parcel of land described as follows, commencing at the centre of Peyton street, in the city of Chicago, at the south line of Sedgwick addition, thence along the south line of said addition west to the middle of the north branch of the Chicago river, thence southerly along the centre of said north branch to the centre of Ontario street on the proposed Kingsbury slip, thence along the centre of said street on slip easterly to Peyton street, thence along the centre line of Peyton street northerly to the place of beginning; also the south half of the northwest quarter (¼) section thirty-two (32), in township thirty-nine (39), north of range fourteen (14), east of the third principal meridian.

The within named defendants not found in my county.

JOHN GRAY,
Sheriff.
By H. NELSON,
Deputy.

Fees, $4 10, paid by plaintiff's attorney.

And thereafter, to wit, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and fifty-nine, came the said plaintiff, by his said attorneys, and filed in the office of the clerk of said court his declaration in said suit, which said declaration is in the words and figures following to wit:

State of Illinois, Cook County, *ss.*

Superior Court of Chicago, October Term, A. D. 1859.

Mahlon D. Ogden, trustee of the Chicago Land Company, plaintiff in this suit, by Scammon, McCagg, and Fuller, his attorneys, complain of John A. Washington and William F. Turner, defendants, duly summoned, &c., of a plea that they render unto him the sum of thirty-five thousand dollars, which they owe to and unjustly detain from him.

For that, whereas, heretofore, to wit, on the fourteenth day of June, in the year of our Lord one thousand eight hundred and fifty-nine, at Chicago, to wit, at the county of Cook, certain articles of agreement were then and there made, agreed, and concluded upon between the said plaintiff, of the one part, and the said defendant, of the other part. Which said articles of agreement, sealed with the seals of the said defendants, is in words and figures as follows:

OFFICE OF OGDEN, FLEETWOOD & CO.,
CHICAGO, July 20, 1859.

We will give M. D. Ogden, trustee Chicago Land Co., sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4th, 1855, or thereabouts, and pay for the same as follows, thirty-five thousand in cash within the next sixty days, and the balance in one, two, and three years, in equal instalments, with six per cent. interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the water front on block 35 Elstour addition to Chicago, by Robbins, a difference in the purchase-money shall be made corresponding to the value of the property lost. The said M. D. Ogden, &c., agrees to sell to John A. Washington and William F. Turner, both of Virginia, the above-described property for the said sum of sixty-seven thousand and five hundred dollars, payable as above, and on the payment of the said thirty-five thousand dollars cash, within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same for the payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright.

(Signed)	MAHLON D. OGDEN.	[SEAL.]
(Signed)	JOHN A. WASHINGTON.	[SEAL.]
(Signed)	WM. F. TURNER.	[SAEL.]

And the said plaintiff avers, that although the said contract with said Wright has been surrendered and cancelled, and the said plaintiff has, during the sixty days and at all times since, been ready to make a deed to said defendants for said property described in said contract, upon payment of the said thirty-five thousand dollars, and take a bond and mortgage on the same for the payment of the balance of thirty-two thousand five hundred dollars, yet the said defendants did not within the said sixty days pay to the said plaintiff the said sum of thirty-five thousand dollars, nor have they since paid the same, or any part thereof, to the said plaintiff, whereby an action has accrued to the said plaintiff to have and demand of and from the said defendants the said sum of thirty-five thousand dollars, above demanded.

And for that whereas the said defendant heretofore, to wit, on the twentieth day of August, in the year of our Lord one thousand eight hundred and fifty nine, at Chicago, to wit, at Cook county, the said defendants were indebted to the said plaintiff in the sum of thirty-five thousand dollars, for the price and value of lands sold by *by* the said plaintiff to the said defendant at his request; and in the sum of thirty-five thousand dollars, for money then and there lent by the said plaintiff to the said defendant, at his request; and in the sum of thirty-five thousand dollars for money then and there lent by the said plaintiff to the said defendants, at their request; and in the sum of thirty-five thousand dollars for money then paid by the said plaintiff, for the use of the said defendants, and at their request; and in the sum of thirty-five thousand dollars, for money there had and received by the said defendants, for the use of the said defendants; and in the sum of thirty-five thousand dollars, for money found to be due from said defendants to said plaintiff on an account there stated between them, which said several sums of money respectively were to be paid by said defendants to said plaintiff on request; whereby and by reason of the nonpayment thereof, an action hath accrued to the said plaintiff to have of and from the said defendant the said sums of money above demanded.

Yet the said defendant has not paid said sums of money, or any part thereof.

And for that whereas also heretofore, to wit, on the twentieth day of June, in the year of our Lord one thousand eight hundred and fifty-nine, at Chicago, to wit, at the county of Cook, certain other articles of agreement were then and there made, agreed, and concluded upon, between the said plaintiff of the one part, and the said defendant of the other part, which said articles of agreement, sealed with the seal of the said defendant, is in the words and figures as follows:

OFFICE OF OGDEN, FLEETWOOD & CO.,
CHICAGO, June 20, 1859.

We will give M. D. Ogden, trustee, &c., Chicago Land Co.,

sixty-seven thousand five hundred dollars for the property described in the John S. Wright contract, with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash, within the next sixty days, and the balance in one, two, and three years, in equal instalments, with six per cent. interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the result of our being deprived of the water front on block 35, Elston's addition to Chicago, by Robbins, a difference in the purchase-money shall be made, corresponding to the value of the property lost. The said M. D. Ogden, trustee, &c., agrees to sell to John A. Washingon and Wm. F. Turner, both of Virginia, the above-described property, for the said sum of sixty-seven thousand five hundred dollars, payable as above, and on the payment of the said thirty-five thousand dollars cash within the next sixty days, he said make a deed to said Washington & Turner for said property and take a bond and mortgage on the same for the payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright.

MAHLON D. OGDEN. [SEAL.]
JOHN A. WASHINGTON. [SEAL.]
WM. F. TURNER. [SEAL.]

And plaintiff avers that said property referred to in said Wright's contract in the above argument mentioned, is the property described more particularly as follows:

Block thirty-three, thirty-four, and thirty-five, in Elston's addition to Chicago, in the County of Cook, and State of Illinois, and lots fifty-six to seventy-two, both inclusive, in block twenty, in Sheffield's addition to Chicago, and blocks number twenty-three, thirty-three, and forty, in Sheffield's addition to Chicago, in the county of Cook, and State of Illinois.

And the said plaintiff avers, that although he, the said plaintiff, during the said sixty days, and at all times since, has been ready to make a deed to said defendants for the property above described, being the same property contained in said contract with said Wright, upon payment of the said thirty-five thousand dollars so agreed to be paid by the said defendants, and has performed all the covenants on his part and behalf to be performed, yet the said plaintiff did not pay within the said sixty days to the said plaintiff the said sum of thirty-five thousand dollars, nor have they since paid the same or any part thereof to the said plaintiff, or to any person or persons on his behalf, whereby an action hath accrued to have and demand of and from the said defendants the said sum of thirty-five thousand dollars above demanded.

Yet the defendants, although often requested so to do, have not as yet paid the said sum of thirty-five thousand dollars, or any part thereof, to the said plaintiff, but they to do this, have hitherto wholly refused, and still do refuse, to the damage of this plaintiff, of ten thousand dollars, and therefore he brings suit, &c.

SCAMMON, McCAGG & FULLER,
Pltff's Attys.

The contract set out above is the contract sued upon in this declaration.

And afterwards, to wit, on the twenty-eighth day of October, being one of the days of the said October term of said court, in the year of our Lord one thousand eight hundred and fifty-nine, the following proceedings were had in *in* said cause, and entered of record in said court, to wit:

Attachment.

MAHLON D. OGDEN, Trustee of the Chicago Land Company,
v.
JOHN H. WASHINGTON and WILLIAM F. TURNER.

And now came the said defendants, by G. R. Hughes and Gaskins, and Thomas and Roberts, their attorneys, and enter their appearance to said suit, and file their petition for the removal of this cause for trial into the Circuit Court of the United States, for the Southern District of Illinois, and offer good and sufficient surety for their entering in said Circuit Court of the United States, on the first day of its ensuing session, copies of the process against them, in pursuance of the 12th section of the act of Congress of the United States, approved September 24th, 1789, entitled an act to establish the Judicial Courts of the United States, and it appearing to the satisfaction of the court that the plaintiff herein is, and was, at the commencement of this suit, a citizen of the State of *of* Illinois, and that each of the defendants is, and was, at the commencement of this suit, a citizen of the State of Virginia, and that the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs, it is ordered that said surety be accepted in pursuance of said act of Congress.

It is therefore ordered by this court, that said cause be removed into said Circuit Court of the United States, according to the statute in such case made and provided.

State of Illinois, Cook County, *ss.*

I, Walter Kimball, clerk of the Superior Court of Chicago, in and for the county of Cook, and State of Illinois, do hereby certify, that

the above and foregoing is a full, true and correct transcript of the præcipe, affidavit for attachment, attachment, bond, writ of attachment, with sheriff's return thereon and declaration, being all the papers now on file in my office, together with all orders entered of record in said court, in a certain suit therein, wherein Mahlon D. Ogden is plaintiff, and John A. Washington and William F. Turner are defendants.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court at Chicago, in said county, this 29th day of October, A.D. 1859.

WALTER KIMBALL,
Clerk.

Indorsed: Filed Dec. 19, 1859. Wm. H. Bradley, clerk.

And on the same day, to wit, the nineteenth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, the aforesaid defendants, John A. Washington and William F. Turner, by Messrs. Hughes and Gookins, Thomas and Roberts, came into the office of the clerk of the Circuit Court of the United States, for the Northern District of Illinois, and filed their appearance herein, in the words and figures following, to wit:

"*Appearance.*"

In the Circuit Court of the United States, for the Northern District of Illinois.

Attachment.

Remove from Superior Court of Chicago.

MAHLON D. OGDEN, Trustee of the Chicago Land Company,
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER.

And now came the defendant, by Hughes & Gookins, Thomas & Roberts, their attorneys, and enter their appearance in the above cause.

HUGHES & GOOKINS,
THOMAS & ROBERTS,
For Defendants.

Indorsed: Filed Dec. 19th, 1859. Wm. H. Bradley, clerk. "Demurrer."

And the same day, to wit, the nineteenth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, the

aforesaid defendants, by their said attorneys, came into the office of the clerk of the court and district aforesaid, and filed their demurrer herein, which said demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States, for the Northern District of Illinois. December Term, A.D. 1859.

JOHN A. WASHINGTON and
WILLIAM F. TURNER, defendants,
v.
MAHLON D. OGDEN, Trustee of the
Chicago Land Company.

And the said defendants, by Hughes and Gookins, Thomas & Roberts, their attorneys, come and defend the wrong and injury, when, &c., and say that the said first count of the said declaration, and the matters and things therein contained, in reason and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants; and they, the said defendants, are not bound by law to answer the same, and this they are ready to verify: wherefore, by reason of the insufficiency of the said first count of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them.

HUGHES & GOOKINS,
THOMAS & ROBERTS,
For Defendants.

And the defendants further say, that the said last count of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant; and they, the said defendants, are not bound by law to answer the same; and this they are ready to verify.

Wherefore, by reason of the insufficiency of the said last count of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, &c.

And the said defendants state and show to the court the following cause of demurrer to the said declaration, that is to say, that the plaintiff alleges generally that he has performed all the covenants on his part and behalf to be performed, but does not show how, nor the particular manner in which he has performed the same. Nor does the plaintiff allege that he has tendered a deed, but only that he was ready to make a deed to the defendants for the property in

said count described; nor does he allege that he notified the defendant of his readiness.

And also, that the said count of the said declaration is in other respects uncertain, informal, and insufficient.

HUGHES & GOOKINS,
THOMAS & ROBERTS,
For Defendants.

And the defendants further demur separately to each and every count of the said declaration, and say that the matters and things in each of them contained, in manner and form as therein stated and set forth, are not sufficient by law for the said plaintiff to have and maintain his aforesaid action thereof against the said defendants, and that they are not bound by law to answer either of said counts, and this they are ready to verify; whereby reason of the insufficiency of each and every of the counts of the said declaration in that behalf, the said defendants pray judgment of each and every of said counts, and that the said plaintiffs may be barred from having or maintaining his aforesaid action thereof against them, &c.

HUGHES & GOOKINS,
THOMAS & ROBERTS,
For Defendants.

Indorsed: Filed Dec. 19th, 1859. Wm. H. Bradley, clerk.

And this day, to wit, the seventeenth day of January, A.D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, &c.,
v.
JOHN A. WASHINGTON et al.

Now comes the plaintiff by his attorney, and confesses the demurrers filed herein by the defendants; and on motion, leave is granted him by the court to amend his declaration.

And afterwards, to wit, the twenty-first day of January, in the year of our Lord one thousand eight hundred and sixty, the aforesaid plaintiff by his said attorneys came into to the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed his additional count to his aforesaid declaration herein, which said additional count is in the words and figures following, to wit:

Also, for that heretofore, to wit, on the 20th day of June, A.D. 1859, at the city of Chicago, in said Northern District of Illinois, the said defendants then and there executed and delivered to the plaintiffs their certain articles of agreement, sealed with their seals, and now here shown to the court; which articles of agreement mentioned are in substance as follows:

OFFICE OF OGDEN, FLEETWOOD & CO.,
CHICAGO, June 20, 1859.

We will give M. D. Ogden, trustee Chicago Land Company, sixty-seven thonsand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash within the next sixty days, and the balance in one, two, and three years, in equal instalments, with six per cent. interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the water front on block 35, Elston's addition to Chicago by Robins, a difference in the purchase-money shall be made corresponding to the value of the property lost. The said M. D. Ogden, trustee, &c., agrees to sell to John A. Washington and Wm. F. Turner, both of Virginia, the above described property for the said sum of sixty-seven thousand five hundred dollars, payable as above; and on the payment of the said thirty-five thousand dollars cash, within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same for payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright.

(Signed) MAHLON D. OGDEN. [SEAL.]
" JOHN A. WASHINGTON. [SEAL.]
" WM. F. TURNER. [SEAL.]

And the plaintiff avers that said contract with John S. Wright, in said articles of agreement mentioned, was surrendered to the plaintiff and cancelled on, to wit, the 28th day of June, 1859, and within sixty days from the date of said contract, and that the plaintiff was, during all the time thereafter, until the expiration of sixty days from the date of said agreement, and ever since, has been ready and willing, at the office of Ogden, Fleetwood & Co., in Chicago, to receive the sum of thirty-five thousand dollars aforesaid from said defendants, agreed to be paid by them in and by said articles of agreement, and was also then and there, and ever since has been ready and willing, at the office of Ogden, Fleetwood & Co., in Chicago, to deliver to said defendants a deed of the property in said agreement referred to, which the plaintiff avers is described as follows: all those certain lots and parcels of land, situated in the city of Chicago, county of Cook, and State of Illinois, known and distinguished as blocks thirty-three, thirty-four, and thirty-five, in Elston's addition to Chicago, and lots forty-six to seventy-two, both inclusive, in block twenty in Sheffield's addition to Chicago, on the payment by said defendants of the said sum of thirty-five thousand dollars in cash. Yet the defendants have never paid the said

sum of thirty-five thousand dollars, or any part thereof, and never attended at the office of Ogden, Fleetwood & Co., aforesaid, to pay the same, either within the sixty days after the date of said agreement, or since, but so to do have wholly neglected and refused, whereby an action hath accrued to the plaintiff to demand and have of and from the defendants the said sum of thirty-five thousand dollars above demanded.

Yet, though often requested, the defendants have not paid the same or any part thereof, to the plaintiffs' damage the sum of ten thousand dollars. Therefore they bring suit, &c.

SCAMMON, McCAGG & FULLER.

Indorsed: Filed January 21st, 1860. Wm. H. Bradley, clerk.

And afterwards, to wit, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and sixty, the aforesaid, the defendants, by their said attorneys, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their demurrer herein, which said demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN A. WASHINGTON and WILLIAM F. TURNER, defendants,
ads.
MAHLON B. OGDEN, Trustee of the Chicago Land Company.

And the said defendants, by Hughes & Gookins, Thomas & Roberts, come and defend and crave oyer of the articles of agreement, sealed with their seals, as pretended in the additional count of the plaintiff's declaration, and it is read to him in the words and figures as follows, to wit (here to be inserted):

And the defendants say that the said additional count of the plaintiff's declaration, and the matters and things therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and they, the said defendants, are not bound by law to answer the same, and this they are ready to verify.

Wherefore, by reason of the insufficiency of the said count in this behalf, the said defendants pray judgment, and that the said plain-

tiff may be barred from having or maintaining his aforesaid action thereof against them.

HUGHES & GOOKINS,
THOMAS & ROBERTS,
For Defendants.

And the defendants state and show to the court here the following among other causes of demurrer to the said count.

That an action of debt will not lie for the said $35,000, being an instalment of the larger sum of $67,500 dollars, the *the* whole being not yet due nor sued for.

That under no circumstances will an action of debt lie on the said articles of agreement.

That the averments of the said count are not sufficient to enable the plaintiff to recover.

GOOKINS,
THOMAS & ROBERTS,
For Defendants.

Indorsed: Filed Jan. 28th, 1860. Wm. H. Bradley, clerk.

And this day, to wit, the twenty-second day of March, A. D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN
v.
JOHN A. WASHINGTON et al.

Now come the defendants by their attorneys, and with leave of the court withdraw their demurrer heretofore filed herein to the amended declaration, and on motion the time within which to plead is extended ten days.

And afterwards, to wit, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty, the aforesaid defendants by their said attorneys come into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their pleas herein, which said pleas is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN A. WASHINGTON and WILLIAM F. TURNER
v.
MAHLON D. OGDEN, Trustee of the Chicago Land Company.

No. 1. And now come the said defendants by Hughes & Gookins, Thomas & Roberts, their attorneys, and defend the wrong and

injury where, &c., and say that they do not owe the said sum of thirty-five thousand dollars above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them; and of this the said defendants put themselves upon the country, &c. Wherefore they ask judgment, &c.

HUGHES, GOOKINS,
THOMAS & ROBERTS,
For Defendants.

No. 2. And for a further plea in this, leave of the court being first had, the defendants say actio non, &c., because they say that the said plaintiff was not ready to deliver to said defendants a deed of the property in said agreement in manner and form as the plaintiff hath above alleged; and of this the defendants put themselves upon the country, &c.

No. 3. And for a further plea in this behalf, leave of the court being first had, &c., the defendants say actio non, &c., because they say that the said contract with John S. Wright, in said articles of agreement mentioned, was not surrendered and cancelled within sixty days from the date of the said contract, in manner and form as the plaintiff has above averred; and for this they put themselves upon the country. Wherefore, &c.

No. 4. And the defendants crave oyer of the said supposed writing obligatory, and it is read to them in these words:

OFFICE OF OGDEN, FLEETWOOD & CO.,
CHICAGO, June 20, 1859.

We will give M. D. Ogden, trustee Chicago Land Co., sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash within the next sixty days, and the balance in one, two, and three years (in equal instalments), with six per cent. interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the water front on block 35, Elston's addition to Chicago, by Robbins, a difference in the purchase-money shall be made corresponding to the value of the property lost. The said M. D. Ogden, trustee, &c., agrees to sell to John A. Washington and William F. Turner, both of Virginia, the above-described property for the said sum of sixty-seven thousand *thousand* and five hundred dollars, payable as above; and on the payment of the said thirty-five thousand dollars cash within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same for the payment of the balance of thirty-two thousand five hundred dollars,

to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright.

MAHLON D. OGDEN. [SEAL.]
JOHN A. WASHINGTON. [SEAL.]
WM. F. TURNER. [SEAL.]

And for a further plea in this behalf, leave of the court being first had, &c., the defendants say actio non, because they say that the said plaintiff had not, at the termination of sixty days from the date of said contract, a good and sufficient legal title, free from all incumbrance, in and to the property referred to in the contract in the plaintiff's declaration mentioned; and this they are ready to verify. Wherefore the defendants pray judgment.

No. 5. And for a further plea in this behalf, leave of the court being first had and obtained, &c., the defendants say actio non, &c., because they say that they did not execute and deliver to the plaintiff their certain articles of agreement, as alleged in the said declaration of the plaintiff; and of this they put themselves upon the country. Wherefore they pray judgment, &c.

No. 6. And the defendants crave oyer of the said supposed writing obligatory, and it is read in these words. (Same instrument as copied in plea No. 4.)

And for a further plea in *in* this behalf, leave of the court being first had and obtained, &c., the defendants say actio non, because they say that the plaintiff had not, at the time of executing the said supposed articles of agreement, nor at any time since, the legal title, free of incumbrance, of the property in the said articles of agreement referred to, and that he was not in condition to convey a good and sufficient legal title to the same at the end of sixty days from the date of the said contract; and this the defendants are ready to verify. Wherefore they ask judgment, &c.

No. 7. And the defendants crave oyer of the said supposed writing obligatory, and it read to them in the words and figures following, to wit. (Same instrument as copied in plea No. 4.)

And for a further plea in this behalf, &c., leave, &c., the defendants say, actio non, &c.; they say that at the time of the execution of the said contract, or articles of agreement, in the said plaintiff's declaration mentioned, the legal title of the entire interest of the water front on block thirty-five, Elston's addition to Chicago, was not vested in the said plaintiff; but that the legal title to a portion of the interest therein, to wit, to an undivided half thereof, was vested in another person, and so continues to the present time, to wit, in one Allen Robbins, and this the defendants are ready to verify. Wherefore, &c.

No. 8. And for a further plea in this behalf, leave, &c., the defendants say actio non, because they say that the said articles of agreement *presented* in the said plaintiff's declaration are not the

deed of these defendants; and of this they put themselves upon the country, &c.

No. 9. And for a further plea in this behalf, leave of the court being first had and obtained, the defendants say actio non, &c., because they say that the said plaintiff was not willing to deliver to the defendants a deed of the property in said agreement referred to, as required by the said agreement; and of this the defendants put themselves upon the country, &c. Wherefore, &c.

No. 10. And for a further plea in this behalf, leave, &c., being first had, the defendants say that the supposed writing obligatory is not their deed; and of this they put themselves upon the country, &c. Wherefore, &c.

HUGHES, GOOKINS,
THOMAS & ROBERTS,
For Defendants.

Indorsed: Filed March 30th, 1860. Wm. H. Bradley, clerk.

And this day, to wit, the sixth day of April, in the year of our Lord one thousand eight hundred and sixty, the aforesaid plaintiffs, by his said attorneys, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their demurrer herein; which said demurrer is in the words and figures following, to wit:

In United States Circuit Court, Northern District of Illinois.

OGDEN et al.
v.
WASHINGTON et al. } Replication.

And now comes the said plaintiff, and as to the first (1), second (2), third (3), fifth (5), eighth (8), ninth (9), and tenth (10), pleas of the said defendants, by them above pleaded, and whereof they have put themselves upon the country, doth the like.

By his attorneys, SCAMMON, McCAGG & FULLER.

Demurrers to 4, 6, and 7, Pleas.

And the said plaintiff, as to the fourth (4), sixth (6), and seventh (7), pleas by the defendants above pleaded, says that the same are not sufficient in law to bar the plaintiff from having and maintaining his action aforesaid against said defendants; and this he is ready to verify.

Wherefore he prays judgment, and his debt aforesaid, with his damages by him sustained by the detention aforesaid, to be adjudged to him, &c.

By his attorneys, SCAMMON, McCAGG & FULLER.

Indorsed: Filed April 6th, 1860. Wm. H. Bradley, clerk.

And afterwards, to wit, the tenth day of April, in the year of our Lord one thousand eight hundred and sixty, the said defendants, by these said attorneys, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their pleas herein; which said pleas are in the words and figures following, to wit:

No. 11. And the said defendants, for a further and eleventh plea in their behalf, say the said plaintiff ought not to have and maintain his action aforesaid against the said defendants, because they say that before the expiration of the said sixty days after the date of the said agreement in the said plaintiff's declaration mentioned, the said defendants, to wit, at the city of Chicago aforesaid, were ready and willing, if the said plaintiff would then and there execute to the said defendants a good and sufficient deed, conveying the said land in the said agreement mentioned to them by a good and perfect title in fee simple, to pay to the said plaintiff the said sum of thirty-five thousand dollars in cash, in the said agreement mentioned, to be paid within sixty days at the office of Ogden Fleetwood & Co., in the city of Chicago, and to execute to the said plaintiff a bond and mortgage of the said land to secure the payment of the residue of the said purchase-money in the said agreement mentioned, payable in one, two, and three years, in equal instalments, with six per cent. interest payable annually, if the said plaintiff would accept the same, whereof the said plaintiff then and there had notice. And the said defendants in fact say that the said plaintiff then and there wholly refused to accept from the said defendants the said bond and mortgage, but then and there prepared and tendered to the said defendants, for execution by them, three several promissory notes, bearing date the twentieth day of June, 1859, and for the sum of ten thousand eight hundred and thirty-three dollars and thirty-three cents, payable one year after date; one other for the same amount, payable two years after date; and another for the sum of ten thousand eight hundred and thirty-three dollars and thirty-four cents, payable three years after date, and payable to the said plaintiff at the office of Ogden, Fleetwood & Co., in the city of Chicago, with interest at six per cent. per annum, payable annually; and also a mortgage from the said defendants to the said plaintiff of the said land, bearing date the said twentieth day of June, 1859, to secure the payment of such promissory notes, and to become void on the payment thereof, with the further condition that if default should be made in the payment of either of the said promissory notes, either of principal or interest, on the days whereon the same should become due and payable, the whole of the said principal and interest secured by the said promissory notes should thereupon, at the option of the said plaintiff, become immediately due and payable, and with covenants in the said mortgage that the said defendants were, at the time of the delivery thereof, the lawful owners of the premises in the said

mortgage mentioned, and that they were seized thereof in fee simple absolute, and that they would warrant and defend the same in the quiet and peaceable possession of the said plaintiff, his successors and assigns, forever, and that they were free from all incumbrances whatsoever, and then and there demanded of the said defendants the execution by them of the said notes and mortgage, so by him the said plaintiff prepared and tendered for execution as aforesaid, and then and there wholly refused to accept or receive from the said defendants any other or different securities for the payment of the moneys aforesaid, and so continued until the expiration of the said term of sixty days from the date of the said agreement, to refuse to accept or receive from the said defendants any other or different securities as aforesaid, and this they are ready to verify. Wherefore they pray judgment.

HUGHES, GOOKINS,
THOMAS & ROBERTS,
Defendants' Attorneys.

No. 12. And for a further and 12th plea in their behalf, the said defendants say the said plaintiff ought not to have and maintain his action aforesaid against the said defendants, because they say that before the expiration of the said sixty days after the date of the said agreement, in the said plaintiff's declaration mentioned, the said defendants, to wit, at Chicago aforesaid, were ready and willing, if the said plaintiff would then and there execute to them a good and sufficient deed, conveying the said land in the said agreement mentioned to them by a good and perfect title in fee simple, to pay to the said plaintiff the said sum of thirty-five thousand dollars in cash, according to the terms, tenor, and effect of the said agreement, to be paid within sixty days at the office of Ogden, Fleetwood & Co., in the city of Chicago, and to execute to the said plaintiff a bond and mortgage of the said land, to receive the payment of the residue of the said purchase-money in the said agreement mentioned, payable in one, two, and three years, in equal instalments, with six per cent. interest, payable annually, if the said plaintiff would accept the same, and so continued to be ready and willing until the expiration of the said period of sixty days, of all which premises the said plaintiff then and there had notice.

And the said defendants in fact say, that the said plaintiff then and there waived and dispensed with the execution of such bond and mortgage, and then and there refused to accept and receive any such securities as the said defendants were then and there ready and willing to execute and give to the said plaintiff in manner aforesaid; but the said plaintiff then and there prepared and tendered to the said defendants for execution by them, three several promissory notes, bearing date the twentieth day of June, 1859, one for the sum of ten thousand eight hundred and thirty-three dollars and

thirty-three cents, payable one year after date; another for the same amount, payable two years after date; and another, for the sum of ten thousand eight hundred and thirty-three dollars and thirty-four cents, payable three years after date, all payable to the said plaintiff, at the office of Ogden, Fleetwood & Co., in the city of Chicago, with interest at six per cent. per annum, payable annually, and also a mortgage from the said defendants of the said land, bearing even date with said notes, to secure the payment thereof, with a condition to become void on the payment thereof, and with the further conditions that if default should be made in the payment of either of the said promissory notes, either of principal or of interest, on the days whereon the same should become due and payable, the whole of the said principal and interest secured by the said promissory notes should become thereupon, at the option of the said plaintiff, immediately due and payable, and that the said mortgage might be immediately foreclosed to pay the same, by the said plaintiff, his successors, or assigns, or the said plaintiff, his successors, or assigns, after publishing a notice in a newspaper, printed at the city of Chicago, for ninety days before the day of such sale, might sell said premises, and all the right and equity of redemption of the said defendants therein at public auction, at the north door of the court-house, in the city of Chicago, to the highest bidder, for cash, at the time mentioned in such notice, and with the further condition that the said defendants in and by said mortgage, waived their right and equity of redemption of the said premises, with power to the said plaintiff to make, execute, and deliver to the purchaser or purchasers thereof, a deed or deeds for the premises so sold, and out of the proceeds of such sale, to pay all costs and expenses incurred in advertising and selling said premises, also the principal and interest which should be due on said promissory notes, and to render the overplus, if any, to the said defendants, their heirs, or assigns, at the office of the said plaintiff, with covenants in the said mortgage, that the said defendants were, at the time of the delivering thereof, the lawful owners of the premises in the said mortgage mentioned, and that they were seized thereof in fee simple absolute, and that they would warrant and defend the same in the quiet and peaceable possession to the said plaintiff, his successors, and assigns, forever, and that they were free from all incumbrances whatsoever, and then and there demanded of the said defendants the execution by them of the said notes and mortgage, so by him the said plaintiff prepared and tendered for execution as aforesaid, and then and there, and until the expiration of the said ninety days from the date of said agreement, wholly refused to accept or receive from the said defendants any other or different securities for the payment of the moneys in the said agreement mentioned, to be secured by bond and mortgage

as aforesaid, and this they are ready to verify. Wherefore they pray judgment.

HUGHES, GOOKINS,
THOMAS & ROBERTS,
Defendants' Attorneys.

No. 13. And for a further and 13th plea in their behalf, the said defendants say the said plaintiff ought not to have and maintain his action aforesaid, against the said defendants, because, they say, the said John S. Wright contract with the trustees of the Chicago Land Company, in the said agreement in the plaintiff's declaration mentioned, was a certain agreement between the said plaintiff and one William B. Ogden of the one part, and the said John S. Wright of the other part, wherein and whereby it was, among other things, covenanted and agreed by and between the said parties, that the said plaintiff and the said William B. Ogden would sell and convey to the said John S. Wright the lands in the said agreement mentioned, for the sum of seventy-three thousand six hundred and forty-five dollars, payable eighteen thousand four hundred and eleven dollars and twenty-five cents cash in hand, and the balance in four equal annual payments.

And that the said plaintiff, and the said William B. Ogden, upon the *the* payment of the said sum of money, and the performance of the other conditions in the said agreement contained, would convey the said lands to the said John S. Wright, which said agreement was then and there duly recorded in the recorder's office of said county of Cook, in the district aforesaid, where said lands are situated; and afterwards, and while the said agreement was in full force, and in no manner cancelled as surrendered, the said John S. Wright, to wit, on the third day of July, 1857, by his certain deed of release and quitclaim, released and quitclaimed all his right, title, and interest in and to the said land to Timothy and Walter Wright, which deed was duly recorded in the recorder's office of said county of Cook; and afterwards, to wit, on the third day of December, 1857, and before the said contract was in any manner surrendered or cancelled, the said John S. Wright, and the said Timothy Wright, and the said Walter Wright, by their certain deed of release and quitclaim, released, conveyed, and quitclaimed unto one James Clapp all their right, title, and interest in and to the said lots and parcels of land, which said deed was duly recorded in the recorder's office of said county of Cook. And the said defendants in fact say, that the said James Clapp did not in any manner before the expiration of sixty days after the making of the said agreement in the said plaintiff's declaration set forth, release or surrender the said right, title, interest, and claim, by him denied in manner aforesaid, in and to the said lands, to the said plaintiff, but, on the contrary thereof, he, the said James Clapp, had and held the same by virtue of the convey-

ance aforesaid, for a long space of time, to wit, for the space of ten days after the expiration of the period of sixty days aforesaid, and this they are ready to verify. Wherefore they pray judgment.

G. R. H. HUGHES,
GOOKINS, THOMAS & ROBERTS,
Defendant's Attorneys.

Indorsed: Filed April 10th, 1860. Wm. H. Bradley, clerk.

And the same day, to wit, the tenth day of April, A.D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, &c.,
v.
JOHN A. WASHINGTON et al. } Debt.

Now comes on to be heard the demurrer of the plaintiff to the fourth, sixth, seventh, eleventh, and twelfth pleas of the defendants, and after hearing the arguments of counsel, the court takes the same under advisement.

And afterwards, to wit, the second day of May, A.D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, &c.,
v.
JOHN A. WASHINGTON et al.

The court having fully considered and being now fully advised upon the demurrer of the plaintiff to the defendant's pleas heretofore submitted, herein sustains said demurrer as to the fourth, sixth, and seventh of said pleas, and overrules said demurrer as to the twelfth of said pleas.

And the same day, to wit, the second day of May, in the year of our Lord one thousand eight hundred and sixty, the aforesaid plaintiff, by his said attorneys, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed his replication herein; which said replication is in the words and figures following, to wit:

In U. S. Circuit Court, N. District of Illinois, May T., 1860.

MAHLON D. OGDEN, &c.,
v.
JOHN A. WASHINGTON and W. F. TURNER.

And now comes the said plaintiff, and as to the eleventh (11), twelfth (12), and thirteenth (13) pleas of the defendants above pleaded,

says precludi non, because he says the matters in said pleas above pleaded and set forth, are not true in substance and fact as therein pleaded and set forth, and that without the cause in said pleas assigned, but in these own wrong refused to pay the plaintiff the said sum of money in said declaration demanded. This he prays may be inquired of by the country, &c.

By his attorneys,
SCAMMON, McCAGG & FULLER.

And the defendants doth the like.
GOOKINS, THOMAS & ROBERTS,
Defendants' Attorneys.

Indorsed. Filed May 2d, 1860. Wm. H. Bradley, clerk.

And afterwards, to wit, the third day of May, A.D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, &c.
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER. } Debt.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Thomas B. Penton, Alonzo Hamlin, Aaron Haven, P. S. Sherlock, John Ghent, Henry Warren, W. Y. Daniels, J. P. True, S. W. Kenig, R. L. Chapman, William Keillan, and James G. Deven, who were duly elected, tried and sworn, well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

And this day, to wit, the fourth day of May, A. D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, &c.
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER. } Debt.

Now come again the parties, by their attorneys, and now come also the jury heretofore impanelled in this cause, and after hearing the concluding testimony and arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict. And by agreement of the parties, by their attorneys, it is ordered by the court that the jury, when they shall have agreed upon a verdict, may sign and seal the same, deliver the same to the clerk and disperse, and meet the court to-morrow morning.

And afterwards, to wit, the fifth day of May, A. D. 1860, in the

records of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, &c.
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER. } Debt.

Now come again the parties, by their attorneys, and now come also the jury heretofore impanelled in this cause, and return into court the following verdict, to wit: "We, the jury, find the issue for the plaintiff. We find his debt at the sum of thirty-five thousand dollars, and assess his damages thereon at the sum of fourteen hundred and eighty-one dollars and sixty-six cents." Whereupon the defendants beg their attorneys move the court for a new trial herein.

And this day, to wit, the second day of October, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

MAHLON D. OGDEN, Trustee of the Chicago Land Co.,
v.
WILLIAM F. TURNER and JOHN A. WASHINGTON. } Debt.

Now comes on to be heard the motion of the defendant, heretofore made herein, for a new trial of this cause, and the court, after hearing the arguments of counsel, takes time to consider.

And this day, to wit, the twenty-second day of October, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

MAHLON D. OGDEN, Trustee, &c.,
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER. } Debt.

The court having fully considered and being now fully advised on the motion of the defendants, heretofore made herein, for a new trial of this cause, overrules said motion, and the defendants beg their attorneys move in arrest of judgment.

And this day, to wit, the second day of November, A. D. 1860, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

MAHLON D. OGDEN, Trustee of the Chicago Land Co.,
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER. } Debt.

The court having fully considered and being now fully advised upon the motions of the defendant for a new trial of this cause, and

in arrest of judgment, overrules said motion. Whereupon the defendants, by their attorney, excepts to the ruling of the court as to the motion in arrest of judgment. And the plaintiff begs his attorneys move the court that judgment be entered on the verdict of the jury heretofore, to wit, on the fifth day of May last, entered herein.

It is thereupon considered and adjudged by the court that the plaintiff have and receive of the defendants the said sum of thirty-five thousand dollars, his debt, and fourteen hundred and eighty-one dollars and sixty-six cents damages; amounting to the sum of thirty-six thousand four hundred and eighty-one dollars and sixty-six cents, his debt and damages, so as aforesaid found and assessed by the jury, together with his costs by him about his suit in their behalf expended, amounting to the sum of dollars and cents, and that he have execution therefor.

And this day, to wit, the fifth day of May, in the year of our Lord one thousand eight hundred and sixty, the aforesaid defendants, by their said attorneys, come into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their bill of exceptions herein, which said bill of exceptions are in the words and figures followiug, to wit:

United States. Northern District of Illinois, —— Term, 1860.

MAHLON D. OGDEN
v.
JOHN A. WASHINGTON, and
WILLIAM F. TURNER. } Debt.

Be it remembered, that on the trial of this cause before the court and jury, the said plaintiff, to maintain the issues on his part, gave in evidence the argument set forth in the plaintiff's declaration, as follows, to wit:

OFFICE OF OGDEN, FLEETWOOD & CO.,
June 20, 1859.

We will give M. D. Ogden, trustee Chicago Land Co., sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract, with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash, within the next sixty days, and the balance in one, two, and three years, in equal instalments, with six per cent. interest, payable annually. It is understood that it is payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the water front in block 35, Elston's addition to Chicago, by Robbins, a difference in the purchase-money shall be made, corresponding to the value of the property lost. The said M. D. Ogden, trustee, &c., agrees to sell

to John A. Washington and Wm. F. Turner, both of Virginia, the above-described property, for the said sum of sixty-seven thousand five hundred dollars, payable as above; and on the payment of said thirty-five thousand dollars cash, within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same for the payment of the balance of thirty-five thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright.

M. D. OGDEN. [SEAL.]
JOHN A. WASHINGTON. [SEAL.]
WM. F. TURNER. [SEAL.]

The plaintiff then gave in evidence the John S. Wright contract, mentioned in said agreement, with the indorsement of the recording of the same made thereon, which are as follows, to wit:

Trustees of Chicago Land Co., to John S. Wright, agent.

Articles of agreement, made and concluded the fourth day of June, in the year one thousand eight hundred and fifty-five, between William C. Ogden and Mahlon D. Ogden, trustees of the Chicago Land Company, parties of the first part, and John S. Wright, of the city of Chicago, Illinois, of the second part, witnesseth, that the party of the first part, at the request of the parties of the second part, and in consideration of the money to be paid, and the covenants as herein expressed to be performed by the party of the second part, the prompt performance of which payments and covenants being condition precedent, and time being the excuse of said condition, agree hereby to sell to the said party of the second part all those certain lots and parcels of land situated in the city of Chicago, county of Cook, and State of Illinois, known and distinguished as blocks thirty-three, thirty-four, and thirty-five, in Elston addition to Chicago, and lots forty-six to seventy-two, both inclusive, and block twenty, in Sheffield's addition to Chicago, and blocks twenty-three, thirty-three, and forty, in Sheffield's addition to Chicago, with the privileges and appurtenances thereto belonging.

And the said party of the second part, in consideration of the premises, hereby agrees to pay to the said party of the first part, his or their successors, administrators or assigns, at the office of Ogden, Jones & Co., in the city of Chicago, the sum of seventy-three thousand six hundred and forty-five dollars, as follows, viz., eighteen thousand four hundred and eleven $\frac{28}{100}$ dollars cash, in four equal annual payments of like amount, payable on the first day of June, in each of the years 1859, 1860, and 1861, and 1862, together with interest at the rate of six per cent. per annum, from the date hereof, to be paid semi-annually, on the first day of June and De-

cember in each year, on the whole sum remaining from time to time unpaid; and that he will well and faithfully, in due season, pay or cause to be paid, all ordinary taxes, assessed and for revenue purposes, upon said premises or any part thereof, subsequent to the year 1854; and also all other assessments which now or may be hereafter charged or assessed upon or against said premises, or any part thereof. But in case the said *the said* party of the second part fail to pay any or all such taxes or assessments upon said premises or appurtenances, or any part thereof, whenever and as soon as the same become due or payable, and the party of the first part shall pay from time to time, or at any time, any or all such taxes or assessments, or cause the same to be paid, the amount of any and all such payments so made by the parties of the first part, shall immediately thereupon become said additional consideration, said payment to be made by the party of the second part hereto for the premises herein agreed to be conveyed.

The above sale is made for the price and terms and on the credits above named, on the condition, pledge, assurance, promise, and agreement of the said second party hereto, that he will remove his reaper manufactory in Chicago, with its appendages, into and upon *and upon* the said block thirty-five, in Elston addition above named, and contracted to him as above named, in the year 1856, and will continue thereafter, by himself or others, to conduct the business of manufacturing reapers thereon for five years, and while engaged in the business; and upon the further condition and agreement of the said second party hereto, for himself, his heirs, and assigns, that he will and shall build and erect of said block 35, in Elston addition aforesaid, fixed and permanent brick and stone buildings, of a substantial and very respectable and suitable character for the business to be conducted therein, and of a cost and value equal to the sum of twenty thousand dollars in cash or more, from four to five thousand dollars of which sum of improvements in building as aforesaid, shall be expended as aforesaid, in all of the year 1855, and the balance in the year 1856, and in the case of failure so to remove and conduct said reaper establishment, and so to improve and build upon the said premises herein contracted to be sold to the said party of the second part, and at the time and the extent herein named, and thereby benefit and improve the adjoining and neighboring property of the first parties hereto, and the property they represent as trustees of the Chicago Land Company as aforesaid, then it is especially and mutually understood and agreed between the parties hereto, that the said second parties hereto shall pay the further sum of twenty thousand dollars for said premises, in addition to the sum of seventy-three thousand six hundred and forty-five dollars, and interest above named, said further sum of twenty thousand dollars to become due and payable on the first day of January, A. D. 1857, with six per cent. interest from the date hereof, and it is also further

especially agreed between the parties hereto, that in case of such default of said second party to remove his reaper manufactory and business upon the premises named in the time named, or in case of failure to erect and construct the said buildings thereon, of the character and value and at the time hereinbefore named and agreed upon, that then and in that case the said principal sum of seventy-three thousand six hundred and forty-five dollars, part consideration money first hereinbefore named, shall become due and payable as follows, to wit: the sum of $24,548 33 in each of the first days of June in the years 1857, 1858, and 1859, with semi-annual interest thereon, as is hereinbefore provided, anything hereinbefore to the contrary notwithstanding. It is further especially agreed that at any time after January 1st, 1857, upon request of said second party hereto, this contract shall be divided into seven contracts, one for each of the seven blocks herein contracted to be sold, and each for the consideration of the price paid for that particular block as recently aforesaid; provided, however, that all the conditions and stipulations hereinbefore contained shall first have been met, fulfilled, and complied with, without any failure therein, and provided that the contract for said block thirty-five, in Elston addition aforesaid, shall contain a clause holding and securing it as collateral security to all said contracts, and shall be so held and availed of until the half of the principal and all the interest due on each shall have been paid; and the said party of the first part further covenants and agrees with the said party of the second part, that upon the faithful performance by the said party of the second part of his undertakings in this behalf, and of the payment of the principal and interest of the sum above mentioned in the manner specified, they, the said party of the first part, shall and will, without delay, well and faithfully execute, acknowledge, and deliver in person or by attorney duly authorized, to the party of the second part, his heirs, or assigns, a deed of conveyance of all the right, title, and interest of the party of the first part, of, in, and to the above-described premises, with their appurtenances, with covenants of warranty against any act or thing done or suffered by the party of the first part.

And it is mutually covenanted and agreed by and between the parties hereto, that in case default shall be made *made* in any of the payments of principal or interest at the time or any of the times above specified for the payment thereof, this agreement and all the preceding provisions hereof shall be null and void, and no longer binding, at the option of said party of the first part, their successors, representatives, or assigns, and all the payments which shall then have been made hereon, or in pursuance hereof, absolutely and forever forfeited to the said party of the first part, or at the election of the said party of the first part, their successors, representatives, or assigns, the covenant and liability of said party of the second

part shall continue and remain obligatory upon the said party of the second part, and may be enforced, and the said consideration-money and every part thereof, with the semi-annual interest as above specified, be collected by proper proceedings in law or equity from the said party of the second part, his heirs, executors, administrators, or assigns.

And it is further mutually covenanted and agreed, by and between the parties hereto, that in case of default in the payment stipulated to be made by the said party of the second part, or any part thereof, and the election of the party of the first part, their successors, representatives, or assigns, to consider the foregoing contract of sale at an end, and prior payments forfeited; the said party of the second part, his heirs, representatives, or assigns, who may have possession, or the right of possession, of said premises at the time of such default, or at any time thereafter, shall be considered and are hereby agreed and declared to be, in law and equity, the tenant and tenants at will of said party of the first part, their successors, representatives, and assigns, and a rent equal to an interest of ten per cent. per annum on the whole amount of the purchase-money above specified, payable quarter-yearly, from the date of such default in payment of principal or interest; and after such *such* default and payment, and election to consider the above contract of sale void, the said party of the first part, their successors, representatives, and assigns, shall and may have and exercise all the powers, rights, and remedies provided by law or equity, to collect such rent, or remove such tenant or tenants, the same as if the relation of landlord and tenant hereby declared were created by an original, absolute leave for that purpose, and specified rent, payable quarterly, on a tenure at will; and that in such cases the said tenant or tenants shall and will pay or cause to be paid all taxes and assessments, ordinary or extraordinary, which may be laid or assessed on said premises, or any part thereof, during the continuance of such tenancy; and will not commit or suffer any waste or damage to said premises or the appurtenances, but will keep and deliver up, on the termination of such tenancy, the said premises and appurtenances, in as good order and repair, ordinary wear and decay and unavoidable injury by the elements excepted, as they were in at the commencement of such tenancy.

In witness whereof, the party of the second part, in his own proper person, have hereunto respectively set their hands and seals, on the day and year first above written.

W. B. OGDEN, [SEAL.]
Trustee.
M. D. OGDEN, [SEAL.]
Trustee.
I. S. WRIGHT, [SEAL.]

Sealed and delivered
in presence of [SEAL.]

No. 60,009. Filed for record June 5th, 1855.

State of Illinois, County of Cook, *ss.*

I, William L. Church, clerk of the Circuit Court, and ex officio recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of a certain instrument filed in my office on the 5th day of June, A.D. 1855, and recorded in book No. 90 of deeds, on page 420, the parties to the same being trustees Chicago Land Co., of the first part, and John S. Wright, of the second part.

In testimony whereof, I have hereunto set my hand, and affixed the seal of our said court, at Chicago, this 10th day of April, A.D. 1860. [SEAL.]

WM. L. CHURCH,
Clerk of the Circuit Court, ex officio
Recorder of Cook County.

The plaintiff called Stanley H. Fleetwood, who, being duly sworn, testified that he knew the parties to this suit; that he was a member of the firm of Ogden, Fleetwood & Co., whose office was at the corner of Lake and Clark streets, in the city of Chicago; that he was at the said office during all the sixty days mentioned in the contract between the parties, except from the 28th of July to the 10th of August, 1859; that the plaintiff was at said office during all the time that witness was there; that the plaintiff was there from the 10th to *to* the 20th of August. The contract with John S. Wright, hereinbefore set forth, being handed to the witness, he testified that he knew the said Wright; that said Wright brought the said contract to the office of Ogden, Fleetwood & Co. about the time of the negotiation with Washington and Turner, and told Mr. Ogden that he desired to surrender it and cancel it, and that he did not wish to have anything further to do with it; that he was very glad the property had been sold, and that it was off his hands. That this occurred a few days after the execution of the Washington and Turner contract. Witness was there from the 10th of August. Mr. Ogden was ready to convey the property, and the deed was prepared by, and Mr. Ogden was ready to execute it. That Washington and Turner did not come there to his knowledge, and there was no *no* offer to pay the money then, to his knowledge.

On his cross-examination, said witness testified that he left the office on the 28th of July, and returned the 10th of August; that the clerks in the office prepared a deed from Mr. Ogden, as trustee of the Chicago Land Company, to Washington and Turner, for the signature of Mr. Ogden alone; that Mr. Ogden had a wife living at that time, and still has.

The plaintiff here rested.

The defendant thereupon gave in evidence the following deeds, with the recording indorsements thereon, to wit:

This indenture, made the third day of July, in the year of our Lord one thousand eight hundred and fifty-seven (A.D. 1857), between John S. Wright and C. B. Wright, his wife, of the first part, and Timothy Wright and Walter Wright, all of the city of Chicago, in the county of Cook, State of Illinois, of the second part, witnesseth, that the said party of the first part, in consideration of the sum of three hundred thousand dollars ($300,000) in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged by these presents, do release, alien, and convey and quitclaim unto the said parties of the second part, and their heirs and assigns, forever, all the right, title, interest, claim, and demand, which the said parties of the first part have in and to the following described pieces of land, situated in the county of Cook and State of Illinois, described as follows, to wit: All that part of block one (1) of the original town of Chicago, commencing thirty (30) feet west of the northeast corner of said block, running thence west one hundred and forty (140) feet, fronting on Kinzie street, with a depth back of one hundred feet (100), more or less, to the alley in the rear; also lots two (2), three (3), four (4), of block five (5) of the original town of Chicago, and all that portion of lots five (5), six (6), seven (7), and eight (8), of said block five (5), bounded by Wells street, Kinzie, and Franklin streets, and the Railroad alley, being three hundred and twenty feet (320), more or less, fronting on Kinzie street, by seventy (70) and eighty (80) feet, more or less, on Franklin and Wells streets; also lots five (5) in block ninety-four (94) of the school section addition to Chicago; also lot one (1) in block one (1) of the fractional section fifteen (15), addition to Chicago; also blocks two (2), five (5), seven (7), twelve (12), thirteen (13), and the undivided half of four (4), in Wright's subdivision of the northeast quarter ($\frac{1}{4}$) of section (12) twelve, in town thirty-nine (39) north, range thirteen (13) east; also blocks thirty-three (33), thirty-four (34), and thirty-five (35), in Elston's addition to Chicago; also blocks twenty-three (23), thirty-three (33), and forty (40), and lots forty-six (46) to seventy-two (72) inclusive, in block twenty (20), in Sheffield's addition to Chicago; also sub-lots seven and eight (7 and 8) of the subdivision of lots (14) fourteen and thirteen (13), and the north half of lot (12) twelve, in block fourteen (14) of the Fort Dearborn addition to Chicago; also the one undivided fifth part of the southeast acre and a quarter, more or less, of lot No. four (4) in the subdivision by order of Cook County Circuit Court, of the southwest quarter of section eight (8), town thirty-nine 39, range fourteen (14); also the north half of section No. three (3), and the east ($\frac{1}{2}$) half and northwest quarter of the southeast quarter of said section three (3), in town thirty-seven (37) north, of range fourteen (14) east, four hundred and forty (440) acres, more or less; to have

and to hold the same, together with all and singular the appurtenances and privileges thereto belonging, or in any wise appertaining, and all the estate, right, title, interest, and claim, whatever, of the said parties of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever.

In witness whereof the said parties of the first part hereunto set their hands and seals the day and year first above written.

J. S. WRIGHT. [L. S.]
C. B. WRIGHT. [L. S.]

State of Illinois, Cook County, *ss.*

I, Chas. B. Hosmer, a notary public in and for said county, in the State aforesaid, do hereby certify, that Jno. S. Wright, who is personally known to me as the real person whose name is subscribed to the within deed, appeared before me this day in person, and acknowledged that he executed and delivered the said deed as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this third day of July, in the year of our Lord one thousand eight hundred and fifty-seven (A.D. 1857).

[L. S.] C. B. HOSMER,
Notary Public.

State of Illinois, Cook County, *ss.*

I, Charles B. Hosmer, a notary public in and for said county, in the State aforesaid, do hereby certify that C. B. Wright, personally known to me *personally known to me* as the same person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that she signed, sealed, and delivered the said instrument of writing as her free and voluntary act for the uses and purposes therein set forth. And the said C. B. Wright, wife of the said S. S. Wright, having been by me examined, separate and apart and out of the hearing of her husband, and the contents and meaning of the said instruments of writing having been by me made known and explained to her, acknowledged that she had freely and voluntary executed the same, and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal notarial, this third day of July, A.D. 1857.

[L. S.] C. B. HOSMER,
Notary Public.

No. 98,979. Filed for record 13 July, 1857, B. 138, p. 581.

State of Illinois, County of Cook, *ss.*

I, William L. Church, clerk of the Circuit Court, and ex-officio recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of a certain instrument filed in my office, on the thirteenth day of July, A.D. 1857, and recorded in book the 138 of deeds, on page 581, the parties to the same being John S. Wright and wife, of the first part, and Timothy and Walter Wright, on the second part.

In testimony whereof, I have hereunto set my hand, and affixed the seal of our said court, at Chicago this 10th day of April, A.D. 1860.

WM. L. CHURCH,
Clerk of the Circuit Court and ex-officio Recorder of Cook County.

John S., Timothy, and Walter Wright, to James Clapp.

This indenture, made this third day of December, in the year of our Lord one thousand eight hundred and fifty-seven, between John S. Wright, Timothy Wright, and Joanna his wife, and Walter Wright, all of the city of Chicago, county of Cook, and State of Illinois, of the first part, and James Clapp, of the same place, of the second part, witnesseth, that the said parties of the first part, for and in consideration of ten dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have secured, released, and quitclaimed, and by these presents do remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns, forever, all that part of block one (1) of the original town of Chicago, commencing thirty (30) feet west of the northeast corner of said block, running thence west one hundred and forty feet (140), fronting on Keinzie street, with a depth back one hundred (100) feet, more or less, to the alley in the rear; also two (2), three (3), four (4) of block five (5) of the original town of Chicago; and all that portion of lots five (5), six (6), seven (7), eight (8) of said block five (5), bounded by Wells, Keinzie, and Franklin streets, and the Railroad alley, being three hundred and twenty (320) feet, more or less, fronting on Keinzil street, by (70) seventy and eighty (80) feet, more or less, on Franklin and Wells streets. Also lot five (5), in block ninety-four (94) of the School Section addition to Chicago. Also lot one (1), in block one (1), of the fractional section fifteen (15), addition to Chicago. Also blocks two (2), five (5), seven (7), twelve (12), thirteen (13), and the undivided half of four (4) in Wright's subdivision of the northeast quarter ($\frac{1}{4}$), of section twelve (12), in town thirty-nine (39) north, range thirteen (13) east. Also blocks thirty-three (33), thirty-four (34), and thirty-five (35), in Elston's addition

to Chicago. Also blocks twenty-three (33), thirty-three (33), and forty (40), and lots forty-six (46) to seventy-two (72) inclusive, in block twenty (20), in Sheffield's addition to Chicago; also sub-lots seven and eight (7 and 8), of the subdivision of lots fourteen (14), and thirteen (13), and the *and the* north half of twelve (12), in block fourteen (14), of the Fort Dearborn addition to Chicago; also the south half ($\frac{1}{2}$) of the west half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section twenty-eight (28), in township forty-one (41) north, range thirteen (13) east; also the one undivided fifth part of the southeast acre and a quarter, more or less, of lot No. four (4) in the subdivision by order of Cook County Circuit Court, of the southwest quarter of section eight (8), town thirty-nine (39), range fourteen (14); also the north half of section No. (3) three, and the east half, and the northwest quarter of the southeast quarter of said section three (3), in township thirty-seven (37) north, of range fourteen east, four hundred and forty (440) acres, more or less, all being situate in the county of Cook, and State of Illinois. Together with all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances unto the said paaty of the second part, his heirs and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. S. WRIGHT. [L. S.]
TIMOTHY WRIGHT. [L. S.]
JOANNA H. WRIGHT, [L. S.]
By her attorney in fact, L. D. WARD.
WALTER WRIGHT. [L. S.]

State of Illinois, County of Cook, *ss.*

I, Charles B. Hosmer, a notary public in and for the said county, in the State aforesaid, do hereby certify that J. S. Wright, Timothy Wright, and Joanna H. Wright (by her attorney in fact, S. D. Ward), and Walter Wright, personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth; and the said Joanna H. Wright, wife of the said Timothy Wright, by her said attorney in fact, S. D. Ward, acknowledged that she had freely and

voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, and that she does not wish to retract the same.

[L. S.] Given under my hand and notarial seal this twelfth day of December, A. D. 1857.

C. B. HOSMER,
Notary Public.

No. 95,459. Filed for record Dec. 12th, 1857.

State of Illinois, County of Cook, *ss.*

I, William L. Church, clerk of the Circuit Court, and ex-officio recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of a certain instrument filed in my office on the twelfth day of December, A. D. 1857, and recorded in book No. 146 of deeds, on page 634, the parties to the same being J. S. Sims and Walter Wright of the first part, and James Clapp of the second part.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at Chicago, this 10th day of April, A. D. 1860.

WM. L. CHURCH,
Clerk of the Circuit Court, and ex-officio Recorder of Cook County.

The defendants then gave in evidence the following depositions of John W. Burke and Arthur Herbert, to wit:

United States of America, Northern District of Illinois, *ss.*

The United States of America to W. B. Price, Esq., as commissioner at Alexandria, in the State of Virginia, greeting.

We, reposing special confidence in your fidelity and provident circumspection, do hereby authorize and appoint you to take the testimony in writing of John W. Burke and Arthur Herbert, of said Alexandria, whom you are hereby authorized and required to bring before you at such time and place as you may designate and appoint for that purpose, and that at such time and place you will proceed to examine under oath said witnesses upon the interrogatories hereunto annexed, at the instance of the defendants in a certain cause now pending and undetermined in our Circuit Court of the United States for the Northern District of Illinois, before the judges thereof, wherein Mahlon D. Ogden is the plaintiff, and John H. Washington and William F. Turner are the defendants. The annexed interrogatories, and the answers thereto, you will cause to be reduced to writing, in the order in which they shall be proposed and answered, and shall then be signed by said witnesses. At the foot thereof you

will add a certificate, subscribed by yourself, stating that it was sworn to and subscribed by said witnesses, and the time and place when and where the same were taken; which said examination of said witnesses so taken, with your certificate thereto attached, you will send directed to our clerk of our Circuit Court of the United States for the Northern District of Illinois, sealed, with the names of the parties litigant indorsed thereupon, with early dispatch, together with this writ.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago, [SEAL.] Illinois, this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and sixty, and of our independence the 84th year.

WM. H. BRADLEY,
Clerk.

In the Circuit Court of the United States for the Northern District of Illinois.

MAHLON D. OGDEN
v.
JOHN A. WASHINGTON and WILLIAM F. TURNER.

Interrogatories to be administered to John A. Burke and Arthur Herbert respectively, witnesses on the part of the defendants, resident of the city of Alexandria in the State of Virginia.

Interrogatory 1st. State your age, residence, and occupation, and whether you are acquainted with the parties defendant, and whether you are the bankers of one or both of them, and of which of them.

Interrogatory 2d. If you have any knowledge on the subject, state all you know in reference to the readiness and willingness of either or both of the defendants to remit to Chicago, Illinois, the sum of thirty-five thousand dollars for the purpose of paying the plaintiff the first instalment on a contract entered into by and between the plaintiff and defendants for the purchase of real estate. Was the money sent? And if it was not sent, please state the reason why, and all you know on the subject.

Interrogatory 3d. If Mr. Washington, one of the above-named defendants, made any arrangement with reference to the remitting of the said sum of money, please state with particularity at what time it was, and by what time it was to have been in Chicago, if any was fixed; and state all you know about it.

We hereby stipulate that a commission may issue instanter for the taking of the depositions of the above-named witnesses, with the same effect as if we had received regular notice.

SCAMMON, McCAGG & FULLER.

April 24, 1860.

I, Wm. B. Price, of the city of Alexandria, in the State of Virginia, do certify, that pursuant to a certain commission which issued from the Circuit Court of the United States for the Northern District of Illinois, to me directed, and herewith returned, and by which I was authorized and appointed to take the testimony in writing of John H. Burke and Arthur Herbert, of the city of Alexandria, at the instance of the defendants, in a certain cause now pending and undetermined in the said court, wherein Mahlon D. Ogden is plaintiff and John A. Washington and William F. Turner are the defendants, I did, on the twenty-seventh day of April, in the year eighteen hundred and sixty, cause the said John W. Burke and Arthur Herbert to come before me at my office in the city of Alexandria aforesaid, and I did then and there proceed to examine them under oath upon the interrogatories annexed to said commission, and have reduced to writing the answers of the said witnesses to the said interrogatories in the order in which they were propounded as follows.

The said John W. Burke, having been first duly sworn, deposeth and saith as follows.

In answer to the first interrogatory he says:

1st. I am thirty-five years old; reside in Alexandria, in the State of Virginia; am a banker by occupation, and a member of the firm of Burke & Herbert, who are engaged in the banking business. I am acquainted with the defendant Washington, and the firm of Burke & Herbert are the bankers of Washington.

In answer to the second interrogatory he says:

I know that John A. Washington prior to the first of August, in the year eighteen hundred and fifty-nine, was ready and willing to remit to Chicago, Illinois, the sum of thirty-five thousand dollars, to be there used as I understood for the purpose of paying it to M. D. Ogden on account of property in Chicago, which at the time I understood had been purchased by the defendants from Mr. Ogden. We made arrangements for remitting the money for Mr. Washington at his instance, and he was solicitous that the money should be ready in time. At the time Mr. Washington requested us to arrange for the remittance, he stated that it was to meet his payment to Mr. Ogden for property which the defendants had purchased of him. We were prepared, on notice from Mr. Washington, to remit by the first of August, eighteen hundred and fifty-nine, thirty-five thousand dollars. [The money was not sent out. The reason that Mr. Washington gave countermanding the order, was that Ogden had not nor would not comply with his contract.—Suppressed.]

In answer to the third interrogatory he says:

In June or July, eighteen hundred and fifty-nine, Mr. Washington requested us to prepare to remit for him thirty-five thousand dollars to Chicago, so that the money would be at the Marine Bank of Chicago before the eighteenth day of August, eighteen hundred and fifty-nine, to pay Ogden, when we understood his payment to Ogden

would be due. We held bonds owned by Mr. Washington, and he authorized us, if necessary, to sell them at a sacrifice to have the money ready in time to be in Chicago by the eighteenth of August, eighteen hundred and fifty-nine. Our firm were ready to remit by, and indeed before, the first of August, and so continued ready until after the eighteenth of that month, when we were informed by Mr. Washington that he would not require the money.

And further this deponent saith not.

JOHN W. BURKE.

And I certify that the foregoing answers were signed by the said John W. Burke, and sworn to by him, at my office in the city of Alexandria, in the State of Virginia, on this the twenty-seventh day of April, 1860.

WM. B. PRICE,
Commissioner.

The said Arthur Herbert, having been first duly sworn, deposeth and saith as follows:

In answer to the first interrogatory, he says:

I am thirty-one years old; reside in Alexandria, the State of Virginia; am a member of the firm of Burke & Herbert, who are engaged in the banking business, which firm are the bankers of John A. Washington; and acquainted with defendants, Washington and Turner.

In answer to the second interrogatory, he says:

In the summer of eighteen hundred and fifty-nine, Mr. Washington was willing and anxious to remit thirty-five thousand dollars to Chicago, Illinois, as I understood, to pay to M. D. Ogden, on account of some property purchased from him by Mr. Washington and Mr. Turner. At Mr. Washington's instance, we made arrangements to remit that sum, thirty-five thousand dollars, to Chicago by the first of August, eighteen hundred and fifty-nine, though Mr. Washington's instructions were, that we should be prepared to have it at the Marine Bank, in Chicago, by the fifteenth of August, eighteen hundred and fifty-nine, as his payment came due on the eighteenth of that month. [The money was not sent for the reason, as there stated by Mr. Washington, that Ogden had not, or would not comply with his contract.—Suppressed.] The money was ready, and could have been remitted any time after the first of August, eighteen hundred and fifty-nine, on the requisition of Mr. Washington, and we so continued ready until after the eighteenth of August, eighteen hundred and fifty-nine.

In answer to the third interrogatory, he says:

Mr. Washington instructed us to have the money ready, so as to be certain to have it in Chicago by the fifteenth of August, eighteen hundred and fifty-nine. He authorized us to sell his bonds at a

sacrifice, if necessary to raise it. I understood that his payment came due to Ogden on the eighteenth of August, and the money was intended to meet that payment.

And further this deponent saith not.

ARTHUR HERBERT.

And I certify that the foregoing answers were signed by the said Arthur Herbert, and sworn to by him, at my office in the city of Alexandria, in the State of Virginia, on this the twenty-seventh day of April, 1860.

WM. B. PRICE,
Commissioner.

Cost of foregoing depositions, five dollars, paid by defendants.
W. B. PRICE.

Opened for defendants' attorney May 2d, 1860.
WM. H. BRADLEY,
Clerk.

The defendants then called G. R. H. Hughes, Esq., who testified as follows: He was employed by Messrs. Washington and Turner to act as their agent in closing up a contract for the purchase of real estate from the Chicago Land Company, with instructions to examine the title after obtaining an abstract, and to obtain a proper surrender or release of an outstanding interest in this property, as provided for in the contract; to impart the result of the examination of title, and to lose no time in attending to these particulars; was also particularly requested by them to send on the proper bond and mortgage for the deferred payments. I think on Friday, July 22, I called upon Mr. Ogden, and asked for a release of the Wright contract, and also for an abstract of the title for the property. In reply, Mr. Ogden stated that the surrender of the Wright contract should be properly attended to, and proceeded then to look up among some files of papers some abstracts relating to this property. He handed to me a mortgage and some three notes, I believe, requesting me to forward them to Mr. Washington for execution. I sent them by mail that same day, July 22d, to Mr. Washington. I received them *them* back again. I think the day after receiving them I returned them to Mr. Ogden personally, to wit, the mortgage and notes. The date of the letter accompanying them was July 20th. The time of letters between Mt. Vernon and Chicago is usually two or three days. The letter was dated at Mt. Vernon and post-marked at Alexandria. On receiving the letters of the 25th of July, inclosing the first mortgage and notes as returned, I called on Mr. Ogden and stated to him in substance Mr. Washington's objections to the papers, and, as well as I can recollect, as follows: That he certainly expected a paper release or surrender of the

outstanding Wright interest. That in the absence of a release, Mr. Ogden could not make a good title, nor give us possession; and for these reasons, he also objected to the giving of notes, and in the form they had been drawn by Mr. Ogden. He objected to the want of a proper guarantee in the mortgage returned against any possible loss by the Robbins suit. He also objected to the form of the mortgage and the default clauses which gave summary power of sale on default of payment of a tax or assessment, or of any instalment of the principal or interest, or of parts thereof, within thirty days from such default, made at the instance of the mortgagee thereon, or at any time afterwards, on giving sixty days' public notice of such sale, as unfair and as unreasonable. And objected earnestly to the clause giving the mortgagee power to cut off his equity of redemption from as sale for such default. These notes and mortgage shown by the witness and marked respectively, "B," "C," "D," and "E."

B.

This indenture, made this twentieth day of June, in the year of our Lord one thousand eight hundred and fifty-nine, between John A. Washington, of Mt. Vernon, Virginia, and William F. Turner, of Ripon, Jefferson county, Virginia, parties of the first part; and Mahlon D. Ogden, of Chicago, Illinois, sole remaining trustee of the Chicago Land Company, party of the second part, witnesseth, that whereas the said parties of the first part, are justly indebted to the said party of the second part, in the sum of thirty-five thousand five hundred dollars, secured to be paid by their three certain promissory notes, bearing even date herewith, and payable respectively as follows, to wit, are for the sum of ten thousand eight hundred and thirty-three $\frac{33}{100}$ dollars ($\$10,833\frac{33}{100}$), payable in one year from the date thereof; one for the sum of ten thousand eight hundred and thirty-thre $\frac{33}{100}$ dollars ($\$10,833\frac{33}{100}$), payable in two years from the date thereof; and one for the sum of ten thousand eight hundred and thirty three $\frac{34}{100}$ dollars ($\$10,833\frac{34}{100}$), payable in three years from the date thereof; each of said promissory notes being payable at the office of Ogden, Fleetwood & Co., in Chicago, with interest at the rate of six per cent (6c.) per annum, payable annually.

Now, therefore, this indenture witnesseth, that the said party of the first part, for the better security the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said three preceding notes above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part, at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, his successors and assigns, forever, and the following described lots, pieces or parcels

of land, situate in the county of Cook, and State of Illinois, and known and described as follows, to wit, blocks thirty-three (33), thirty-four (34), and thirty-five (35), in Elston's addition to Chicago, also lots forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty (50), fifty-one (51), fifty-two (52), fifty-three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58), fifty-nine (59), sixty (60), sixty-one (61), sixty-two (62), sixty-three (63), sixty-four (64), sixty-five (65), sixty-six (66), sixty-seven (67), sixty-eight (68), sixty-nine (69), seventy (70), seventy-one (71), and seventy-two (72), in block twenty (20); also all of blocks twenty-three (23), thirty-three (33), and forty (40), all in Sheffield's addition to Chicago, as per the plat of the subdivision of blocks seventeen (17), eighteen (18), twenty (20), twenty-one (21), except lots one, six, and twelve in said block twenty-one (21), all of blocks twenty-three (23), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), except lots one, two, three, six, and seven, of said block, thirty-two (32), all of blocks thirty-three (33), thirty-eight (38), thirty-nine (39), forty (40), and forty-one (41), of Sheffield's addition to Chicago, said plat of said subdivision of Sheffield's addition being of record in recorder's office of Cook county, as of October 22d, A.D. 1855, in book 125, of maps, pages 37 and 38.

This mortgage being given to secure a part of the purchase-money for the premises herein described and conveyed.

To have and to hold the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, or in anywise appertaining; and also all the estate, interest and claim whatsoever, in law as well as in equity, which the party of the first part have in, and to the premises hereby conveyed unto the party of the second part, his successors and assigns, and to their only proper use, benefit and behoof.

Provided always, and these presents are upon the express condition, that if the said party of the first part, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the party of the second part, his successors and assigns, the aforesaid sum of money, with such interest thereon, at the time and in the manner aforesaid, in the above-mentioned promissory notes, according to the true intent and meaning thereof, then and in that case, these presents and everything herein expressed, shall be absolutely null and void. But it is further provided and agreed, that if default be made in the payment of either of said promissory notes, either of principal or of interest, on the days whereon the same shall become due and payable, the whole of said principal and interest, secured by the said promissory notes in this mortgage mentioned, shall therefore at the option of said party of the second part, become immediately due and payable, anything herein or in said promissory notes contained to the contrary notwithstanding.

And the said party of the first part do hereby covenant and agree

with the said party of the second part, that at the time of delivery hereof, the said party of the first part are the lawful owners of the premises above granted and seized thereof in fee simple absolute; that they will warrant and defend the above-granted premises in the quiet and peaceable possession of the said party of the second part, his successors and assigns, forever, and they are free from all incumbrances whatsoever.

In witness whereof, the party of the first part, hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered in the presence of

The words (30) on the 29th line, and the words, "said subdivision of," on 30th line, interlined—the word successors written over the words "heirs"—"heirs," executors, administrators," whereas erased before the execution and delivery of these presents. Also lines 47 to 57, both inclusive, erased, beginning with words, "and this mortgage may be," &c., erased before execution and delivery of these presents.

Indorsed "B."

"*C.*"

CHICAGO, ILL., June 20th, 1859.

$10,833$\frac{33}{100}$.

One year after date, we promise to pay to the order of Mahlon D. Ogden, trustee Chicago Land Co., ten thousand eight hundred and thirty-three $\frac{33}{100}$ dollars, at the office of Ogden, Fleetwood & Co., in the *the* city of Chicago, with interest at six per cent. per annum, payable annually. Value received.

"Indorsed C."

"*D.*"

CHICAGO, ILL., June 20th, 1859.

$10,833$\frac{33}{100}$.

Two years after date, we promise to pay to the order of Mahlon D. Ogden, trustee Chicago Land Co., ten thousand eight hundred and thirty-three $\frac{33}{100}$ dollars, at the office of Ogden, Fleetwood & Co., in the city of Chicago, with interest at six per cent. per annum, payable annually. Value received.

"*E.*"

CHICAGO, ILL., June 20th, 1859.

$10,833$\frac{34}{100}$.

Three years after date, we promise to pay to the order of Mahlon D. Ogden, trustee Chicago Land Co., ten thousand eight hundred and thirty-three $\frac{34}{100}$ dollars, at the office of Ogden, Fleetwood & Co., in the city of Chicago, with interest at six per cent. per annum, payable annually. Value received.

"Indorsed E."

Were furnished by Mr. Ogden, and, I think, on August 6th. I

forwarded them in a letter of August 6, to Mr. Washington. They were returned in a letter from Mr. Washington, dated August 10th. I again called on Mr. Ogden, after the receipt. I think they came in ordinary course of mail (sometimes letters were behind time), and I then stated to him the objections of Mr. Washington to that second mortgage, and the notes. That he objected to the clause in the second mortgage; he objected to that mortgage.

At the first interwiew, Mr. Ogden stated that he was surprised at the objections made to the form of the mortgage; that it was the usual one, and the form known in commercial transactions. If they objected particularly, he would modify the default clauses in a new mortgage that he would prepare. He told him he did object. He said he had a perfect right to them in the form he had prepared. That he had a right to interest on the cash payment, as well as the defined payments, from the date of the contract. As to the cash payment he would not insist. As to the release, it should be attended to.

Neither on that interview, or any other previous to 29th August, did he waive, or agree to change the notes in the form in which he had prepared them. In the frequent interviews I had with him, he refused to, and insisted on his right to interest from date. In my interviews, I tried to persuade Mr. Ogden to waive this matter of interest, but he insisted on the notes in the form prepared throughout. I told Mr. Ogden, at my first interview I had with him, and, I think, in every one, that Mr. Washington was desirous and ready to carry out the contract. As to the first conversation, prior to the 25th of July, I assured him that Mr. Washington was then making the arrangements for meeting the cash payments. After the 25th, in my conversations, I told him that Mr. Washington was ready to carry out the contract, and make the cash payment on receiving a title. I informed Mr. Washington of the result of interviews in every instance. The only other reason for not sending on the money, was that I advised him, Mr. Washington, it was unsafe to send on the cash payment until the settlement of these difficulties.

On cross-examination the witness testified as follows:

I cannot tell exactly the day Messrs. Washington and Turner left Chicago. I think it was the next day after the date of the contract. The first time I went to Mr. Ogden's office was to get an abstract. He voluntarily handed the notes and mortgage. At the last interview, when I took the second set of papers, he did not request me to prepare mortgage and other papers of my own.

I told Mr. Ogden I would forward the papers. On my saying I would prefer he would leave the drawing of the mortgage to us, he said he would draw a new one. I never had securities on the money to tender. Mr. Ogden did not, within the time for the performance

of the contract, say that interest should not separate them. On the 29th the last conversation occurred at my office.

The plaintiff then called James Clapp, as a witness, who being duly sworn, testified that he knew the parties to this suit; that he was the assignee of John S. Wright, and was the grantee in the foregoing deed of Dec. 3, 1857. That he knows that the John S. Wright contract was surrendered. That he knew of certain conversations of the parties preliminary to the purchase by Washington and Turner from the Chicago Land Company, some time prior to the making of the contract. He had several conversations with Washington and Turner in June, 1859, prior to the execution of the contract. They knew his connection with the affair, as the assignee of Wright. He explained to them the condition of the Wright contract; that the instalment due in June, 1859, had not been paid, and could not be; and that neither Wright or witness could retain the bond; that the Wright contract would be surrendered because it was at an end; and the witness stated to them he acquiesced in the surrender. These conversations were of a general nature; he could not give the substance of all of them. Washington and Turner were desirous that the Wright contract should be surrendered, as was the witness also, which they knew. About the 6th day of August witness left the city, and went to New York. He did not know if the *the* Wright contract had been delivered to Ogden, by Wright, until after the first of September. When he heard of it he was glad that it had been done. Some time about the first day of September, and not before that day, he received, in the city of New York, from Mr. Ogden, by the hand of B. F. Carver, a deed of release of the property, for his signature, which he executed and returned to Mrs. Ogden. The said deed of release being shown to the witness he testified that this was the same. That the date therein appearing, August 15, 1859, was not the true date; that he did not execute any release of said property until after the first day of September, 1859. He had had several conversations with Washington and Turner before their contract with the plaintiff, in which he had expressed his satisfaction with their proposed purchase; and he had had two conversations to the same effect with Mr. Ogden.

The witness further testified that the interest of the previous year, due on the John S. Wright contract, was paid by the defendant Turner, but that it was paid long before the contract was made between them and Ogden. That he was in possession of the property at the time said contract was made, as assignee of Wright, and was receiving the rents; and he received a portion of the rents during the sixty days after June 20, 1859. The instalment due upon Wright's contract in June, 1859, was never paid. Neither Wright nor myself had the means to pay it. The witness knew of the sale by plaintiff to defendants; he acquiesced in it, and was glad of it.

The said deed of release was given in evidence, as follows, to wit:

This indenture, made this fifteenth day of August, in the year of our Lord one thousand eight hundred and fifty-nine, between James Clapp, of the city of Chicago, county of Cook, and State of Illinois, party of the first part, and Mahlon D. Ogden, of the same place, sole remaining trustee of the Chicago Land Company, of the second part, witnesseth, that the said party of the first part for and in consideration of one dollar, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, hath remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey, and quitclaim, unto the said party of the second part, his successors and assigns, forever, all the right, title, interest, claim and demand which the said party of the first part hath in and to the following described lots, pieces, or parcels of land, to wit: Blocks thirty-three (33), thirty-four (34), and thirty-five (35), in Elston's addition to Chicago, and lots forty-six (46), to seventy-two (72), both inclusive, in block twenty (20), in Sheffield's addition to Chicago, and blocks number twenty-three (23), thirty-three (33), and forty (40), in Sheffield's addition to Chicago, and blocks number twenty-three (23), thirty-three (33), and forty (40), in Sheffield's addition to Chicago, and being the same premises which were contracted to be sold to John S. Wright by William B. and Mahlon D. Ogden, trustees of the Chicago Land Company, by articles of agreement dated June 4th, A. D. 1855, recorded June 5th, A. D. 1855, in book P., of deeds, page 420; and also the same premises which were conveyed or intended to be conveyed by John S. Wright and wife to Timothy and Walter Wright, by quitclaim deed, dated July 3d, A. D. 1857, recorded July 13th, 1857, in book 138 of deeds, page 581, and also conveyed by John S. Wright, Timothy Wright and wife, and Walter Wright, to James Clapp, the said party of the first part hereto, by quitclaim deed, dated December 3d, A. D. 1857, and recorded December 12th, A. D. 1857, in book 148 of deeds, page 134.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any case thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the second part, either in law or equity, to the only proper use, benefit and behoof the said party of the second part, his successors and assigns, forever.

In witness whereof the said party of the first part hereunto set his hand and seal the day first above written.

(Signed) JAMES CLAPP. [SEAL.]

Sealed and delivered in presence of

State of Illinois, Cook County, Town of South Chicago, *ss.*

I, John Forsyth, a notary public in and for the said town of South Chicago, in said county, in the State aforesaid, do hereby certify that James Clapp, who is personally known to me to be the same person whose name is subscribed to the within deed, as having executed the same, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this fifth day of May, A. D. 1860 (sixty).

(Signed) JOHN FORSYTH,
Notary Public.

Indorsed "A." Copy. Quitclaim deed from James Clapp to Mahlon D. Ogden, trustee.

No. 32,813.

State of Illinois, Cook County.

This instrument was filed for record on the seventh day of May, A. D. 1860, at the hour of o'clock, M., and duly recorded in book 189 of deeds, at page 153.

(Signed) WM. L. CHURCH,
Clerk of Circuit Court, and
Ex-officio Recorder.

The plaintiff called as a witness William F. Fleetwood, who testified that he was a clerk of Ogden, Fleetwood & Co., and was present at an interview between the plaintiff and G. A. H. Hughes, about the 28th to 30th July, 1859. Mr. Hughes at that time received from Mr. Ogden the second mortgage and notes, to be forwarded to Virginia to be executed by the defendants. They were drawn by the witness. It was the recollection of witness that when Mr. Ogden gave them to Mr. Hughes, he said, if you do not like them, draw them to suit yourself, or he would dispense with a mortgage, and it might stand upon contract, if defendant would pay the money due. The contract Mr. Ogden proposed was not the then subsisting contract between the parties, but such a contract as they commonly used in their office, like that with John S. Wright. Mr. Turner, before he left for Virginia, requested that the papers might be made out and forwarded for execution. That Mr. Ogden, when he proposed to Mr. Hughes to make out the papers to suit himself, did not abate any *any* of his demands. I went to Mackinac Aug. 12th, and this was before I left.

Mr. Fleetwood, on cross-examination, stated that the contract

mentioned by Mr. Ogden in his offer to let the matter stand upon contract, was the kind of contract used in their office.

John A. Cutler, a witness for the plaintiff, being called and sworn, testified that he was a clerk in the office of Ogden, Fleetwood & Co., and that he was acquainted with the parties in this suit. That was present when Mr. Hughes brought in the notes and mortgage and expressed his dissatisfaction with them, when Mr. Ogden said, "Mr. Hughes, draw your own papers, and I will be satisfied with them, if you do not like those already made." This was some time from the 28th of July to the 6th of August.

G. R. H. Hughes, being recalled by the defendants, testified that the plaintiff did not at any time before the expiration of the sixty days from the 20th of June, 1859, tell him to make out the papers to suit himself, but that until after the expiration of said sixty days, he persisted in demanding the securities in the form in which he had prepared them.

The foregoing was all the evidence in the case. After the testimony was closed, the court instructed the jury substantially as follows:

1st. As this was an action brought to recover the first payment mentioned in the contract of the 20th of June, 1859, the jury, before they could give a verdict for the plaintiff, must be satisfied from the evidence that the plaintiff was ready and willing to deliver a deed of the property on payment of the thirty-five thousand dollars, and that the John S. Wright contract, of June, 1855, was surrendered and cancelled within sixty days from the 20th of June, 1859, and whether it had been surrendered and cancelled was a question of fact to be found by the jury under the instructions of the court.

2d. By the terms of the John S. Wright contract, if default were made in the payment of the instalment due in 1859, it was competent for the Messrs. Ogden, at their option, to declare it forfeited and at an end as a contract for conveyance, and the bond might be granted to another. No release or conveyance in writing by Wright or his assignee was absolutely necessary in such case, in order to put an end to the contract to convey. Strictly speaking, Wright, having parted with his interest in the land to Clapp, had no power over the contract; but if he, with the acquiescence and consent of Clapp, after default of payment, delivered the contract to Mr. Ogden, and it was the agreement and understanding of all parties in interest that the contract was at an end, then it might be regarded as substantially surrendered and cancelled. That the offer of the property for sale, and a declaration of forfeiture after default of payment might be sufficient, as showing the exercise of the option on the part of the grantor.

3d. By the true construction of the contract of June 20, 1859, upon the payment of the thirty-five thousand dollars, the plaintiff could not demand the promissory notes and mortgage with conditions as stated by Mr. Hughes. But it was the duty of the defendants to tender the first payment on or before the expiration of sixty days, and when the deed was delivered to them, to give a bond and mortgage for the deferred payments, which, according to the terms of the contract, were payable in one, two, and three years from the date of the contract, with interest, payable annually. Though the plaintiff demanded promissory notes and a mortgage, with objectionable conditions, yet, as he was not authorized to make such demand, if, before any tender or offer to pay the money was made, he waived it, and told the agent of the defendants that he might make out the papers to suit himself; in other words, if he abandoned his demand for the notes and the objectionable mortgage, and only claimed an ordinary bond and mortgage, or if he offered to waive the bond and mortgage altogether, and to let the rights of the parties stand upon the contract existing between them, then the defendants were not excused, but were obliged to make the first payment in the contingency contemplated by the contract within the time stipulated.

To which said charge, and to the said several instructions, and each of them at the time they were so given, the said defendants objected; but the court overruled their said objections, and each of them, and gave to the said jury the said charge and the said several instructions; to which opinion of the court, in giving to the jury the said charge and the said instructions, and each of them severally, and in overruling the said objections of the said defendants thereto, the said defendants, then and there, and before the jury retired to consider of their verdict, except; and because the said evidence, and the said charge and instructions, and the said defendants' objections and exceptions thereto do not appear of record, they pray the court to sign and seal this their bill of exceptions, and make the same a part of the record. Which is done abcordingly. Dated the fourth day of May, 1860.

THOMAS DRUMMOMD. [SEAL.]

Filed May 5th, 1860.

WM. H. BRADLEY,
Clerk.

And this day, to wit, the tenth day of November, in the year of our Lord one thousand eight hundred and sixty, came said defendants, and sued out of said clerk's office their writ of error in said entitled cause; which said writ of error is in the words and figures following, to wit:

United States of America, Northern District of Illinois, *ss.*

The United States of America to the Judges of the Circuit Court of the United States for the Northern District of Illinois, greeting.

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in said court before you, between Mahlon D. Ogden, trustees of the Chicago Land Company, plaintiff, and John A. Washington and William F. Turner, defendants, a manifest error hath happened, to the great damage of the said John A. Washington and William F. Turner, as by their complaint appears; and it being fit that the errors, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are therefore commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this eighth day of No-
[SEAL.] vember, A.D. 1860, and of our independence the 85th year.

WM. H. BRADLEY,
Clerk.

Indorsed: Filed Nov. 18th, 1860. Wm. H. Bradley, clerk.

And the same day, to wit, the tenth day of November, in the year of our Lord one thousand eight hundred and sixty, came the said defendants, by their said attorneys, and filed, in the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, their appeal bond herein; which said appeal bond is in the words and figures following, to wit:

JOHN A. WASHINGTON and WILLIAM F. TURNER
v.
MAHLON D. OGDEN, Trustee of the Chicago Land Company.
} In Error.

Know all men by these presents, that we, John A. Washington, William F. Turner, Thomas B. Bryan, are held and firmly bound

unto the above-named Mahlon D. Oghen, trustee of the Chicago Land Company, in the sum of fifty thousand dollars, to be paid to the said Mahlon D. Ogden, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this fifth day of November, 1860.

Whereas, the above-named John A. Washington and William F. Turner, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the Circuit Court of the United States for the Northern District of Illinois, in favor of the said Mahlon D. Ogden, against the said John A. Washington and William F. Turner, in an action wherein the said Ogden was plaintiff, and the said Washington and Turner were defendants.

Now the condition of this obligation is such, that if the above-named John A. Washington and William G. Turner shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN A. WASHINGTON. [SEAL.]
WM. F. TURNER. [SEAL.]
THOS. B. BRYAN. [SEAL.]

Sealed and delivered in the presence of

EDWARD E. COOKE,
GEORGE V. BYRD,
As to J. A. Washington and W. F. Turner.
WM. H. BRADLEY,
As to Thos. B. Bryan.

Approved.

THOMAS DRUMMOND.

Indorsed: Filed Nov. 10th, 1860. Wm. H. Bradley, clerk.

Whereupon on this day, to wit, the tenth day of November, in the year of our Lord one thousand eight hundred and sixty, a citation issued out of the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, directed to the aforesaid plaintiff, which said citation is in the words and figures following, to wit:

United States of America.

To Mahlon D. Ogden, Trustee of the Chicago Land Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, wherein John A. Washington and William F. Turner are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said Court of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, this 10th day of November, in the year of our Lord one thousand eight hundred and sixty.

THOMAS DRUMMOND.

Service of the above is hereby acknowledged, this 10th day of Nov., 1860.

SCAMMON, McCAGG & FULLER,
Att'ys for Ogden.

Indorsed: Filed Nov. 10th, 1860. Wm. H. Bradley, clerk.

Northern District of Illinois, *ss.*

I, William H. Bradley, clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in the cause wherein Mahlon D. Ogden, trustee of the Chicago Land Company, was plaintiff, and John A. Washington and William F. Turner were defendants, as the same appears of record in said court, and now remaining on file therein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of Chicago, this 30th day of November, A.D. 1860, and of the independence of the United States the 85th year.

[SEAL.]

W. H. BRADLEY,
Clerk.

Supreme Court of the United States. December Term, 1860.

JOHN A. WASHINGTON and WILLIAM F. TURNER
v.
MAHLON D. OGDEN, Trustee of the Chicago Land Company.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Come now the said John A. Washington and William F. Turner, the said plaintiffs in error, by their attorneys, and say that in the foregoing record, proceedings, and judgment of the said Circuit Court for the Northern District of Illinois, manifest error hath intervened in this, to wit:

1. The said Circuit Court erred in sustaining the demurrer of the defendant in error to the fourth plea of the plaintiffs in error, because the said fourth plea was good and sufficient in law to bar the action of the said defendant in error; and because the declaration of the said defendant in error, to which the said plea was pleaded, was wholly insufficient to maintain the said action.

2. The said Circuit Court erred in sustaining the demurrer of the said defendant in error to the sixth plea of the said plaintiffs in error, because the said plea was good and sufficient in law to bar the action of the said defendant in error; and because the declaration of the said defendant in error, to which the said sixth plea was pleaded, was wholly insufficient in law to maintain said action.

3. The said Circuit Court erred in sustaining the demurrer of the said defendant in error to the seventh plea of the said plaintiffs in error, because the said seventh plea was good and sufficient in law to bar the action of the said defendant in error; and because the declaration of the said defendant in error, to which the said seventh plea was pleaded, was wholly insufficient in law to maintain said action.

4. The said Circuit Court erred in instructing the jury on the trial of said cause, as set forth in the bill of exceptions of the said plaintiffs in error, in giving the first, second, and third instructions, and in each of them, and in overruling the exceptions of the said plaintiffs in error thereto, and to each of them, as set forth in said bill of exceptions.

5. The said Circuit Court erred in refusing to arrest the judgment in said cause, and in overruling the motion of the said plaintiffs in error in that behalf, and in giving judgment in favor of the said defendant in error, when, by the law of the land, judgment should have been given for the plaintiffs in error, because the declaration

of the said defendant in error was and is wholly insufficient in law on which to give judgment for said defendant in error.

Wherefore, and for divers other errors in said record and judgment apparent, the said plaintiffs in error pray that the said judgment of the said Circuit Court may be reversed, at the costs of the said defendant in error, and that they may be restored to all they have lost thereby.

GOOKINS, THOMAS & ROBERTS,
Att'ys for Pl'ffs in Error.

SUPREME COURT UNITED STATES.

No. 170.

JOHN A. WASHINGTON, et al.,
vs.
MAHLON D. OGDEN, Trustee of the Chicago Land Company.

In error to the Circuit Court U. S., Northern Dist. of Illinois.

THE CASE.

Ogden brought his suit in the State court against Washington and Turner, on their joint contract (record, p. 6) to recover the sum of $35,000 therein stipulated to be paid "within the next sixty days" after the date of the contract, (July 20, 1859,) on account of the purchase-money of the ground therein described.

The suit was duly removed into the Federal court, on the petition of the defendants, Washington and Turner, (record, p. 9;) and there was judgment for the plaintiff, Ogden; whereupon the defendants sued out this writ of error. Pending the writ Washington died; and it is now prosecuted by Turner, the survivor.

The contract is under seal; and the form of action *debt* begun by attachment levied on real estate of the defendants in Chicago.

POINTS AND AUTHORITIES FOR DEFENDANT IN ERROR.

The errors are assigned on page 53 of the printed record, and will be considered in their order.

The FIRST and SECOND errors assigned are, that the court erred in sustaining plaintiff's demurrer to the fourth and sixth pleas of the defendants, which are in substance the same.

These pleas will be found on pages 16 and 17 of the record, and are merely a denial of the plaintiff's title to the premises contracted for. They do not state any specific objection to the title to those premises, and are therefore bad.

"In all actions against a purchaser, on a contract for the sale of land, the plaintiff is not bound to show that he has title to the land.

"The contract admits, at least, *prima faciæ*, his title, and the *onus* is on the defendant to show that he has none."

3 Richardson's South Carolina, 216, Breithaupt Trustee v. Thurmand.
4 Pickering, 179 and 193, Brown v. Bellows.
3 Michigan, 566, Dwight v. Cuttler.
14 Penn. State Reports, 311, Espy v. Anderson.

The THIRD ERROR ASSIGNED, is the sustaining plaintiff's demurrer to defendant's seventh plea, which will be found on page 17 of the record.

By reference to the contract which is set out on page 16 of the record, it appears that the vendees contracted with reference to a *possible* loss by the vendor of the water front of block 35, Elston's addition to Chicago, claimed by one Robbins, and provision was made for *compensating* them for any loss on that account, by making a corresponding abatement of the purchase-money, leaving the contract in full force as to the residue of the property.

The plea goes to the whole contract; and is in form a bad plea to the action. It should have averred a loss of the water front of block 35, since the making of the contract, and the value of the property so lost, which, if less than the sum sued for, would be only a defence *pro tanto*, and as to all the residue of the propperty, and of the purchase-money, the contract would remain in full force.

The defendants had provided a complete indemnity for loss on that account, and could not rescind the contract, nor resist plaintiff's suit for the purchase-money, without pleading and proving that the value of the property lost exceeded the sum sued for. The plea was clearly bad in not setting out a loss of the water front, and the value of it.

The FOURTH ERROR assigned, calls in question the several instructions which the court gave to the jury.

No objection appears worth considering to the FIRST instruction.

The SECOND instruction is found on page 48 of the record, and must be considered with reference to the terms of the Wright contract, and especially that clause of it found on page 29 of the record, beginning at the eleventh line from the bottom: and the testimony of Fleetwood, on page 31, and that of Clapp, on page 45 of the record.

Washington and Turner both knew of the Wright contract when they made theirs with plaintiff, and were acquainted with

its terms. Under that contract neither Wright nor his assignee, Clapp, had any interest or estate in the premises contracted for, and could acquire none, except by complying with the terms of it.

They had not done this; and Ogden had the right to treat it as at an end, and forfeited, and he might exercise that option in any way he saw fit. He exercised that right by selling the property to defendants, and Wright and Clapp both knew of this, and acquiesced in it.

This was a complete surrender and cancelment of that contract, both in fact and law, according to the decisions of the Supreme Court of Illinois, in which State the property was situated, and which fully sustain the rights under the contract, claimed and exercised by the plaintiff.

21 Illinois, 227, Chrisman vs. Miller.
22 Illinois, 643, Steele vs. Biggs;

and although that contract was not released of record, that formed no valid objection to the title, as was decided in

1 Peters, 138, Greenleaf v Queen et al.
14 Penn. State Reports, 308, Espy v. Anderson.

The charge of the court was therefore right, when compared with the law of Illinois and the facts of the case.

The THIRD instruction of the court is found on page 49 of the record, and relates almost wholly to matters of fact, which are found on pages 47 and 48: testimony of Fleetwood, Cutler, and Hughes.

Notwithstanding the plaintiff demanded security for the deferred payments, more stringent in form than the bond and mortgage named in the contract, he had the right, and it was plainly his duty, to waive such improper demand; and if he did so, and only claimed what he was entitled to under the contract, and did this within the sixty days, and before defendants had refused to perform their part of the contract because of this unreasonable demand, then defendants were bound to fulfil their part of the contract, and the instruction of the court was right.

The jury have found the question of fact in favor of the plaintiff, and their finding is conclusive.

AS TO THE MOTION IN ARREST;

There was no error in overruling it.

This motion, it is supposed, was based on two grounds; *first*, that the action of debt would not lie for the sum sued for, because, it is said, it is for part of a debt due by instalments.

The form of action is supported by the following authorities:

2 Wheaton, 385, Raborg v. Peyton.
1 Mason 243, Bullard v. Bell.
2 Cranch, 10, Faw v. Marsteller.
1 Chitty's Pleadings, 112–13.

The *second* ground of the motion in arrest is supposed to be that the declaration does not aver notice by the plaintiff to defendants of his readiness to perform his part of the contract.

The duty of defendants was to pay the money sued for, and execute the bond and mortgage.

The money was all payable at the office of Ogden, Fleetwood & Co., in Chicago.

It was defendants' duty to attend there, and to pay the money. The first act was to be done by them at a place fixed by the contract.

Plaintiff therefore could do nothing more than be ready to perform his part of the contract when defendants should perform, or offer to perform, their part of the contract.

Hence, no notice from plaintiff to defendants was required, and the averments of plaintiff's readiness to perform his part of the contract was sufficient.

1 Chitty's Pleadings, 326 and 327.
1 East., 208, Rowson v. Johnson.
15 Pickering, 546, Tierney v. Ashley.
5 Johnson, 179, West v. Emmons.
2 Peters, 96, Williams v. The Bank of the United States.

A great many cases might be cited to the same effect, but we deem it unnecessary. A time and place being fixed for the performance by defendants of their part of the contract, and they having never attended to perform their part of it, and the first act of performance resting on them, all the plaintiff could do, was to be ready to perform his part of the contract. He could do nothing in the absence of defendants.

The averments are sufficient, especially after verdict.

1 Chitty's Pleadings, 359, et seq.

It is respectfully submitted that there was no error, and that the judgment must be affirmed.

S. W. FULLER,
J. M. CARLISLE,
For Defendants in Error.

Supreme Court of the United States.

No. 170.

JOHN A. WASHINGTON AND WILLIAM F. TURNER,
PLAINTIFFS IN ERROR,

vs.

MAHLON D. OGDEN,
TRUSTEE OF THE CHICAGO LAND COMPANY.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND POINTS,

BY

A. W. ARRINGTON,

COUNSEL FOR APPELLANTS.

CHICAGO:
PRINTED BY F. FULTON & CO.
1862.

Supreme Court of the United States.

No. 170.

JOHN A. WASHINGTON, AND WILLIAM F. TURNER,
Plaintiffs in Error,
vs.
MAHLON D. OGDEN, Trustee of the Chicago Land Company,
Defendant in Error.

Error to Circuit Court of U. S. for Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

On the 4th of June, 1855, William B. Ogden and Mahlon D. Ogden, trustees of the Chicago Land Company, entered into a contract with John S. Wright, for a sale to the latter, of certain blocks and lots of real estate in the City of Chicago; the consideration specified being over $73,000, payable in four equal annual installments, commencing on the first of June, 1859, together with interest from date, payable semi-annually, on the first of June and December.

It was also provided, that in case of default in any payment of principal or interest, the contract should become void at the option of the vendors; and in such event the vendee was to be considered the tenant at will of the vendors, at a rent equal to ten per centum per annum on the whole amount of the purchase-money, payable quarter-yearly from the date of such default.

Record, pp. 27—30.

On the 3rd of July, 1857, by a proper deed, John S. Wright transferred all his interest in said real estate to Timothy Wright and Walter Wright.

Record, p. 32.

On the 3rd of December, 1857, John S. Wright, Timothy Wright and Walter Wright conveyed, in due form, all their interest in said real estate to James Clapp.

Record, p. 34.

On the 20th of June, 1859, Mahlon D. Ogden entered into an agreement to sell the same property to Washington and Turner. This agreement is copied in the declaration hereinafter cited.

In September, 1859, suit was instituted in the Superior Court of Chicago, on the agreement last mentioned, by Ogden against Washington and Turner, for the recovery of the first payment of $35,000, which suit was afterwards regularly transferred to the Circuit Court of the United States.

In the latter Court, at the December term, 1859, Washington and Turner demurred to Ogden's declaration.

Record, p. 11.

On the 17th of January, 1860, Ogden appeared by attorney, confessed the demurrer, and obtained leave to amend his declaration.

Record, p. 12.

On the 21st of January, 1860, Ogden filed his additional count to the declaration, which count reads as follows:

"Also, for that heretofore, to wit, on the 20th day of June, A. D. 1859, at the City of Chicago, in said Northern District of Illinois, the said defendants then and there executed and delivered to the said plaintiff their certain articles of agreement, sealed with their seals, and now here shown to the Court; which articles of agreement are in substance as follows:

OFFICE OF OGDEN, FLEETWOOD & CO.
Chicago, June 20, 1859.

We will give M. D. Ogden, trustee Chicago Land Company, sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash, within the next sixty days, and the balance in one, two and three years, in equal installments, with six per cent. interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the water front, on block 35, Elston's addition to Chicago, by Robbins, a difference in the purchase-money shall be made, corresponding to the value of the property

lost. The said M. D. Ogden, trustee, etc., agrees to sell to John A. Washington and William F. Turner, both of Virginia, the above described property, for the said sum of sixty-seven thousand five hundred dollars, payable as above; and on the payment of the said thirty-five thousand dollars cash, within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same for payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated.

This agreeement is to be dependent on the surrender and cancelment of said contract with said Wright.

(Signed) MAHLON D. OGDEN. [SEAL.]
JOHN A. WASHINGTON. [SEAL.]
WILLIAM F. TURNER. [SEAL.]

"And the plaintiff avers that said contract with John S. Wright in said articles of agreement mentioned was surrendered to the said plaintiff and cancelled on, to wit, the 28th day of June, 1859, and within sixty days from the date of said contract, and that the plaintiff was during all the time thereafter, until the expiration of sixty days from the date of said agreement and ever since, has been ready and willing, at the office of Ogden, Fleetwood & Co., in Chicago, to receive the sum of thirty-five thousand dollars aforesaid from said defendants, agreed to be paid by them in and by said articles of agreement; and was also then and there, and ever since, has been ready and willing, at the office of Ogden, Fleetwood & Co. in Chicago, to deliver to said defendants a deed of the property in said agreement referred to, which the plaintiff avers is described as follows: All those certain lots and parcels of land, situated in the City of Chicago, County of Cook, and State of Illinois, known and distinguished as blocks thirty-three, thirty-four, and thirty-five, in Elston's addition to Chicago, and lots forty-six to seventy-two, both inclusive,

in block twenty

on the payment by said defendants of the said sum of thirty-five thousand dollars in cash.

"Yet the defendants have never paid the said sum of thirty-five thousand dollars, or any part thereof, and never attended at the office of Ogden, Fleetwood & Co., aforesaid, to pay the same, either within the sixty days after the date of the said agreement, or since, but so to do have wholly neglected and refused, whereby an action hath accrued to the plaintiff to demand and have of and from the defendants, the said sum of thirty-five thousand dollars above demanded.

"Yet though often demanded, the defendants have not paid the same, or any part thereof, to the plaintiff's damage the sum of ten thousand dollars; therefore they bring suit," etc.

(Signed) "SCAMMON, MCCAGG & FULLER."

On the 28th of January, 1860, Washington and Turner filed their demurrer to the additional count.

Record, p. 14.

On the 22nd of March, 1860, Washington and Turner withdrew their demurrer, by leave of the Court, and obtained time to plead.

Record, p. 15.

Afterwards, Washington and Turner filed a number of pleas, several of which were demurred to, and the demurrer sustained as to the fourth, sixth, and seventh.

Record, p. 23.

The fourth plea, after craving oyer, etc., alleges as a defense: "that the said plaintiff had not, at the termination of sixty days from the date of the said contract, a good and sufficient legal title, free from all incumbrance, in and to the property referred to in the contract." Record, p. 17.

The sixth plea sets up the defense: "that the said plaintiff had not, at the time of executing the said supposed articles of agreement, nor at any time since, the legal title, free of incumbrance, of the property in the said articles of agreement referred to, and that he was not in a condition to convey a good and sufficient legal title to the same at the end of sixty days from the date of said contract."

The seventh plea alleges as a defense: "that the legal title to a portion of the interest of the water front on block thirty-five, Elston's addition to Chicago, was vested in one Allen Robbins, and so continues," etc. Record, p. 17.

On the 3rd of May, 1860, a trial of the cause was had, and a verdict rendered for Ogden.

Record, p. 24.

Afterwards, motions were made for a new trial, and in arrest of judgment, which were overruled.

Record, p. 25.

A bill of exceptions was taken on the trial, which embodies ALL the evidence and the instructions of the Court.

Record, pp. 26—49.

The instructions of the Court were the following:

1st. As this was an action brought to recover the first payment mentioned in the contract of the 20th of June, 1859, the jury, before they could give a verdict for the plaintiff, must be satisfied from the evidence that the plaintiff was ready and willing to deliver a deed of the property on payment of the thirty-five thousand dollars, and that the John S. Wright contract of June, 1855, was surrendered and cancelled within sixty days from the 20th June, 1859, and whether it had been surrendered and cancelled was a question of fact to be found by the jury under the instructions of the Court.

2nd. By the terms of the John S. Wright contract, if default were made in the payment of the instalment due in 1859, it was competent for the Messrs. Ogden, at their option, to declare it forfeited and at an end as a contract for conveyance, and the land might be granted to another. No release or conveyance in writing, by Wright or his assignee, was absolutely necessary, in such a case, in order to put an end to the contract to convey. Strictly speaking, Wright, having parted with his interest in the land to Clapp, had no power over the contract; but if he, with the acquiescence and consent of Clapp, after default of payment, delivered the contract to Mr. Ogden, and it was the agreement and understanding of all the parties in interest that the contract was at an end, then it might be regarded as substantially surrendered and cancelled. That the offer of the property for sale, and a declaration of forfeiture after default of payment, might be sufficient, as showing the exercise of the option on the part of the grantor.

3rd. By the true construction of the contract of June 20, 1859, upon the payment of the thirty-five thousand dollars, the plaintiff could not demand the promissory notes and mortgage with conditions as stated by Mr. Hughes. But it was the duty of the defendants to tender the first payment on or before the expiration of sixty days, and when the deed was delivered to them, to give a bond and mortgage for the deferred payments, which, according to the terms of the contract, were payable in one, two and three years from the date of the contract, with interest, payable annually. Though the plaintiff demanded promissory notes and a mortgage, with objectionable conditions, yet, as he was not authorized to make such demand, if, before any tender or offer to pay the money was made, he waived it, and told the agent of the defendants that he might make out the papers to suit himself; in other words, if he abandoned his demand for the notes and the objectionable mortgage, and only claimed an ordinary bond and mortgage, or if he offered to waive the bond and mortgage altogether, and to let the rights of the parties stand upon the contract existing between them, then the defendants were not excused, but were obliged to make the first payment in the contingency contemplated by the contract, within the time stipulated.

POINTS FOR THE PLAINTIFFS IN ERROR.

The judgment in this case, it is submitted, should be reversed for errors apparent on the record, relating to the DECLARATION, the PLEAS, and the CHARGE OF THE COURT.

First, THE DECLARATION is fatally defective in the following particulars:

I. It does not allege any title in Ogden, or show any power in him to convey the property which he had contracted *to sell.* It avers only his "readiness to deliver a deed." But the agreement was "to sell the land," as well as to make a deed. Ogden did not contract "to sell," nor did Washington and Turner contract "to buy" merely "a deed." The subject matter of the contract was "a sale of the land," and the reference to the execution of the deed was only for the purpose of accomplishing that cardinal object. But an agreement "to sell land" is necessarily an engagement to transfer the title. Because "a sale" *ex vi termini* "is a transmutation of property from one man to another." 2 Black. Comm. 446.

"The word sale," in the language of this Court, "is one of precise legal import, both at law and in equity. It means a contract to *pass rights of property* for money." *Williamson* v. *Berry*, 8 How. 544.

"The legal effect of a covenant to sell, is that the land shall be conveyed by deed." *Thomas* v. *Van Ness*, 4 Wendell, 549.

Ogden only avers that "he was ready to make a deed," without specifying the kind of deed, or the nature of his title, and even without alleging any title at all.

Yet a deed might be executed without conveying any title. In fact, no deed can convey title, unless there be title in the maker.

Therefore, the declaration should have averred title in Ogden, and a readiness to execute such a deed as would be effectual to transfer that title. Com. Dig. Pleader, C. 60, and E. 25; 1 Chit. Pl. 327; *Thomas* v. *Van Ness*, 4 Wend. 549; *Glover* v. *Tuck*, 24 Wend. 153; *Tyler* v. *Young*, 2 Scam. 446; *Byrne* v. *McNulty*, 2 Gilman, 428; *Bank of Columbia* v. *Hagner*, 1 Peters, 455.

In the strong language of the latter case, "you cannot compel a vendee to take a lawsuit instead of the land."

"And performance must always be alleged *according to the intent of the contract.* It is not sufficient to pursue the words, if the intent be not also performed." 1 Chit. Pl. 325.

II. The contract shows on its face that the title to the water front of block thirty-five was in doubt, and if lost, a "*difference*" in the purchase money was to be made. Yet the declaration has no averment on that subject, either evincing that such water front was not lost, or if lost, alleging what difference the loss effected in the amount of purchase money. Therefore, on the face of the declaration, the sum payable is altogether uncertain, and for such uncertainty debt will not lie. 1 Chit. Pl. 108; Stephens' Plead. 14; 1 Saund. Pl. & Ev. 403.

III. The declaration does not show the kind of deed which Ogden was ready to give. The allegation is "that he was ready to give a deed of the property." But all the authorities hold that such a vague generality is insufficient. 1 Chit. Pl. 325; 4 Wend. 549; 2 Gilm. 428.

IV. The declaration does not allege notice to the vendees of the surrender and cancellation of the Wright contract, and this being a matter peculiarly within the knowledge of the vendor, should have been stated. 1 Chit. Pl. 327, 328; Com. Dig. C. 73, 74; 2 Parsons on Contracts, 182, 183.

V. Debt will not lie for this one installment of a larger sum not due. 1 Chit. Pl. 118; Co. Litt. 292 *b*; Bac. Abr. Debt, B.; *Fontaine* v. *Aresta*, 2 McLean, 128.

VI. It cannot be pretended that any of the defects in the declaration are aided by the verdict. Because the doctrine of intendment, by which, after verdict, the necessary facts will be presumed to have been proved, never applies when such a presumption stands contradicted by the record. 1 Chit. Pl. 673, 674; *Dobson* v. *Campbell*, 1 Sumner, 319; *Addington* v. *Allen*, 11 Wend. 375. But here, all the evidence is preserved in the bill of exceptions, and it is apparent that not one particle of proof was offered to aid the insufficient allegations of the declaration.

Second, THE PLEAS.

I. The *fourth* and *sixth* pleas are good. They show

that Ogden had no power to convey the property, free from incumbrance, which the contract to sell obviously contemplated.

II. The *seventh* plea is also good. It alleges the vendees to have been deprived of the water front of block 35. But that diminution in property entitled them to a proportional diminution in price. And that fact rendered the sum payable wholly uncertain. Therefore, an action of debt could not be maintained. See authorities previously cited.

III. Ogden demurred to the fourth, sixth and seventh pleas generally, and without discrimination. Hence, if one of them were good, the demurrer should have been overruled. *Levey* v. *Blacklin*, 2 Mass. 541; *Harrison* v. *McIntosh*, 1 Johns. 385; *Cuyler* v. *Trustees*, 12 Wend. 169.

IV. If all the pleas were bad, the demurrer should have been carried back to the defective declaration. 1 Chit. Pl. 668; *Spring* v. *Bank of Mount Pleasant*, 10 Peters, 257.

Third, CHARGE OF THE COURT.

Under this head, it is to be observed that the chief errors relate to that provision in the agreement between the parties, which required the surrender and cancellation of the Wright contract. And it is important to remark that the provision referred to in its legal totality, implied that the Wright contract was to be "surrendered and cancelled" so as to become altogether null in three several aspects: 1, at law; 2, in equity; and

3, as a lease. See Wright contract, Record, pp. 27—30.

Hence, the errors in the charge will be apparent from the mere statement of its contents.

I. The second instruction assumes that a bare declaration of forfeiture of the Wright contract, by the Ogdens, would be legally equivalent to the surrender and cancellation provided for in the agreement between Mahlon D. Ogden and Washington and Turner. Record, p. 48.

But this was strangely erroneous in many respects, of which the following may be taken as fair samples:

1. A declaration of forfeiture is the act of one party only; while a surrender and cancellation must be the mutual act of both parties. Hence, the two acts cannot be considered as legal equivalents.

2. A declaration of forfeiture operates only upon the legal right of the party against whom it is made *in invitum*, yet still leaves to him the possibility of having relief in the forum of equity. 2 Story's Eq. Jur., sec. 776. But a surrender and cancellation bars the contract in equity as well as at law. And hence, again, the two acts cannot be legal equivalents.

3. The declaration of forfeiture, in this case, although it would have put an end to the Wright contract, so far forth as related to the sale, would have operated as the commencement of a most onerous contract of lease. Record, p. 30. And therefore, again, such a declaration of forfeiture would have been altogether different in its legal effect from a surrender and cancellation.

4. Finally, as the most startling error of all, there was not the faintest shadow of evidence in the case,

that the Ogdens, or either of them, ever made any declaration of forfeiture as to the Wright contract.

Therefore, this instruction was clearly erroneous, as tending to mislead the jury. *Caldwell* v. *The United States*, 8 How. 366; *Tucker* v. *Moreland*, 10 Peters, 58; *The United States* v. *Beitling*, 20 How. 254.

II. The second instruction also tended to mislead the jury, by the statement, "that if it was the agreement and understanding of all parties in interest that the" (Wright) "contract was at an end, then it might be regarded as substantially surrendered and cancelled." Record, p. 48. Because, whether this part of the charge announced a true rule of law or the reverse, there was no evidence of any such "agreement and understanding of all the parties in interest."

III. The second instruction involved an error still more extraordinary, in the sentence, "that the offer of the property for sale, and a declaration of forfeiture after default of payment might be sufficient, as showing the exercise of the option on the part of the grantor." Record, p. 48.

This part of the charge was doubtless predicated on the case of *Chrisman* v. *Miller*, 21 Ill. 236, where it was held, "that the mere act of offering the land for sale," after default of the purchaser, "is sufficient to put an end to the contract."

Hence, from the rule asserted in the case just mentioned, the court below deduced the startling inference —that the mere offer of Ogden to sell the land, embraced in the Wright contract, to Washington and Turner, was *per se* a sufficient compliance with the condition

precedent in his agreement with them, to have that contract "surrendered and cancelled." Or, in other words, that the mere fact of making the agreement with Washington and Turner, on the part of Ogden, operated to annul one of its essential provisions. Is not this a novel trick of intellectual legerdemain? Washington and Turner desire to have the Wright contract "surrendered and cancelled." And they enter into a stipulation with Ogden to that effect. And they urge in court, that Ogden has not kept his engagement in that particular. But the judge interposes and says, "The signature of Ogden to the stipulation rendered it null. The promise of Ogden was its own performance!"

It must be remembered that the surrender and cancelment of the Wright contract was a condition precedent to the contract of Washington and Turner. The latter says expressly, "This agreement is to be *dependent* on the surrender and cancelment of the said contract with said Wright." Record, p. 13.

Therefore, the court had no authority to estimate either the importance or necessity of the "surrender and cancelment." The parties had the power to insert any condition that pleased them. And if the Wright contract were even then no more than waste paper, Washington and Turner became entitled, by their agreement, to claim that it should be surrendered and cancelled.

IV. The second instruction was also erroneous, because there was no evidence that Wright "delivered up his contract to Ogden, with the acquiescence and consent of Clapp." For Clapp himself swears positively that he did not know that the contract referred to had been

delivered by Wright to Ogden, until after the first of September." Record, p. 45. Certainly one cannot consent to that of which he is wholly ignorant.

V. The second instruction was also erroneous, in assuming "that the delivery of the Wright contract to Mr. Ogden," even "with the acquiescence and consent of Clapp," would be equivalent to a "surrender and cancellation."

This assumption involved three errors:

1. That delivering up the contract would be equivalent to its surrender and cancellation.

2. That delivery to one of the Ogdens was equivalent to a delivery to them both; since, the Wright contract was joint with both the Ogdens.

3. That the Wright contract was delivered to Mr. Ogden. But this last was an assumption of fact, without one particle of evidence to sustain it.

The only testimony relating to this point, is that of Mr. Ogden's witness, Fleetwood, who states, "that Wright brought the said contract to the office of Ogden, Fleetwood & Co., about the time of the negotiation with Washington and Turner, and told Mr. Ogden that he desired to surrender and cancel it, and that he did not wish to have anything further to do with it; that he was very glad the property had been sold, and that it was off his hands." Record, p. 31.

This is all Mr. Wright said. But there is no proof that he did any thing. He said that he desired to surrender the contract. But there is not the slightest evidence that he did, in fact, deliver it to Mr. Ogden.

Besides, there is no proof that Mr. Ogden either said or did anything in response to the desire and expression

of Mr. Wright. There is no proof even that he was willing to accept the proposed surrender of the Wright contract.

But the surrender and cancellation of a contract cannot be effected by speech merely, and especially by the speech of one of the parties to it. A surrender and cancellation, in order to be legal, must be the mutual act of all the parties to the contract.

VI. The third instruction was erroneous, because there was no evidence "that Ogden offered to let the rights of the parties stand on the contract existing between them." On the contrary, the witness of Ogden, who testifies on that point, says that the offer, alluded to in the charge of the Court, had reference to a contract like that of John S. Wright. Record, p. 47.

But the Wright contract is seen, upon inspection, to belong to a species of the most onerous obligations ever exacted from vendees, and which has received in the West the coarse yet significant name of "cut-throat contracts." See Wright contract. Record, pp. 27—30.

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For Plaintiffs in Error.